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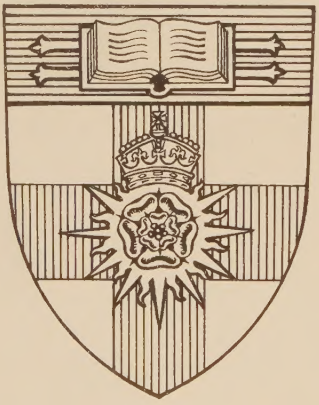

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THE

# LAW REPORTS.

## Court of Queen's Bench.

REPORTED BY

WILLIAM MILLS AND HENRY HOLROYD,
BARRISTERS-AT-LAW.

AND

In the Bail Court,

BY

E. A. C. SCHALCH,
BARRISTER-AT-LAW.

EDITED BY

JAMES REDFOORD BULWER, Q.C.

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# JUDGES

OF

# THE COURT OF QUEEN'S BENCH,

XXIX VICTORIA.

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The Right Hon. Sir ALEXANDER JAMES EDMUND COCKBURN, Bart., C.J.

Sir COLIN BLACKBURN, Knt.

Sir JOHN MELLOR, Knt.

Sir WILLIAM SHEE, Knt.

Sir ROBERT LUSH, Knt.

ATTORNEY GENERAL.

Sir ROUNDELL PALMER, Knt.

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| 188 | 7 from top dele "are" | | |
| 304 | 13 from bottom .. | prisoner .. .. .. | jury. |
| 388 | 8 „ „ .. | Act 20 & 21 .. .. | Act 11 & 12. |

# TABLE OF CASES REPORTED

## IN THIS VOLUME.


A.

| | PAGE |
|---|---|
| Ash *v.* Lynn | 270 |
| Ashby Folville, The Inhabitants of, The Queen *v.* | 213 |
| Asher and Wife *v.* Whitlock | 1 |
| Atkinson *v.* Fosbroke | 628 |

B.

| | |
|---|---|
| Bainbridge *v.* Weardale District Highway Board | 396 |
| Baldy *v.* Saunders | 87 |
| Balls *v.* The Metropolitan Board of Works | 337 |
| Balmforth *v.* Pledge | 427 |
| Bastard, Polden *v.* (Ex. Ch.) | 156 |
| Bilston, Overseers of, Regina *v.* | 18 |
| Bond and another *v.* Weston | 169 |
| Bound *v.* Nott | 405 |
| Bowes, Overseers of Township of, and others, The Overseers of Township of Hilton, &c. *v.* | 359 |
| Brabant *v.* Wilson | 44 |
| Bradfield Union, Guardians of, Nicholson *v.* | 620 |
| Bramwell *v.* Eglinton (Ex. Ch.) | 494 |
| Brand and Wife *v.* Hammersmith, &c., Railway Company | 130 |
| Bushell and Jones, Edmunds *v.* | 97 |
| Buvelot *v.* Mills | 104 |

C.

| | PAGE |
|---|---|
| Carr, Hawkins and another *v.* | 89 |
| ——, Parsons and another *v.* | 89 |
| Chapman *v.* Gwyther | 463 |
| Chatham Extra, Local Board of Health of *v.* Rochester Pavement and Road Commissioners | 24 |
| Churchward *v.* Regina | 173 |
| Clarke *v.* Unwin and others | 417 |
| Cobb *v.* The Mid-Wales Railway Company | 342 |
| Coe *v.* Wise (Ex. Ch.) | 711 |
| Corbett and others, and the L. B. and S. C. Railway Company, Moody *v.* (Ex. Ch.) | 510 |

D.

| | |
|---|---|
| Day, Jeffs *v.* | 372 |
| Dearden *v.* Townsend | 10 |
| Dodd and another, Foster *v.* | 475 |
| ——————, Regina *v.* | 16 |
| Donald *v.* Suckling | 585 |
| Dunn, Wood and another *v.* | 77 |

E.

| | |
|---|---|
| Edmunds *v.* Bushell and Jones | 97 |
| Eglinton, Bramwell *v.* (Ex. Ch.) | 494 |
| Emperor Life Assurance Society, Marshall *v.* | 35 |

# TABLE OF CASES REPORTED

IN THIS VOLUME.


A.

| | PAGE |
|---|---|
| Ash *v.* Lynn | 270 |
| Ashby Folville, The Inhabitants of, The Queen *v.* | 213 |
| Asher and Wife *v.* Whitlock | 1 |
| Atkinson *v.* Fosbroke | 628 |

B.

| | |
|---|---|
| Bainbridge *v.* Weardale District Highway Board | 396 |
| Baldy *v.* Saunders | 87 |
| Balls *v.* The Metropolitan Board of Works | 337 |
| Balmforth *v.* Pledge | 427 |
| Bastard, Polden *v.* (Ex. Ch.) | 156 |
| Bilston, Overseers of, Regina *v.* | 18 |
| Bond and another *v.* Weston | 169 |
| Bound *v.* Nott | 405 |
| Bowes, Overseers of Township of, and others, The Overseers of Township of Hilton, &c. *v.* | 359 |
| Brabant *v.* Wilson | 44 |
| Bradfield Union, Guardians of, Nicholson *v.* | 620 |
| Bramwell *v.* Eglinton (Ex. Ch.) | 494 |
| Brand and Wife *v.* Hammersmith, &c., Railway Company | 130 |
| Bushell and Jones, Edmunds *v.* | 97 |
| Buvelot *v.* Mills | 104 |

C.

| | PAGE |
|---|---|
| Carr, Hawkins and another *v.* | 89 |
| ——, Parsons and another *v.* | 89 |
| Chapman *v.* Gwyther | 463 |
| Chatham Extra, Local Board of Health of *v.* Rochester Pavement and Road Commissioners | 24 |
| Churchward *v.* Regina | 173 |
| Clarke *v.* Unwin and others | 417 |
| Cobb *v.* The Mid-Wales Railway Company | 342 |
| Coe *v.* Wise (Ex. Ch.) | 711 |
| Corbett and others, and the L. B. and S. C. Railway Company, Moody *v.* (Ex. Ch.) | 510 |

D.

| | |
|---|---|
| Day, Jeffs *v.* | 372 |
| Dearden *v.* Townsend | 10 |
| Dodd and another, Foster *v.* | 475 |
| ——————, Regina *v.* | 16 |
| Donald *v.* Suckling | 585 |
| Dunn, Wood and another *v.* | 77 |

E.

| | |
|---|---|
| Edmunds *v.* Bushell and Jones | 97 |
| Eglinton, Bramwell *v.* (Ex. Ch.) | 494 |
| Emperor Life Assurance Society, Marshall *v.* | 35 |

| | PAGE |
|---|---|
| European Central Railway Company *v.* Westall | 167 |
| Evans, Williams and others *v.* | 352 |

F.

| | |
|---|---|
| Farrer and another, Justices, &c., Regina *v.* | 558 |
| Fosbroke, Atkinson *v.* | 628 |
| Foster *v.* Dodd and another | 475 |
| Francis, Strauss *v.* | 379 |
| Fulham District, Board of Works for, Whitchurch *v.* | 233 |

G

| | |
|---|---|
| Glossop Union, Guardians of, Regina *v.* | 227 |
| Godmanchester, Board of Health of, Regina *v.* (Ex. Ch.) | 328 |
| Great Eastern Railway Company *v.* The Overseers of Haughley, Resp. | 666 |
| Great Northern Railway Company *v.* Jennings | 7 |
| Grey, Sir George, Bart., Regina *v.* | 469 |
| Guibert, Lloyd *v.* (Ex. Ch.) | 115 |
| Gwyther, Chapman *v.* | 463 |

H.

| | |
|---|---|
| Hadley and others *v.* Perks and another | 444 |
| Hall, Regina *v.* | 632 |
| Halliday, Kemp *v.* (Ex. Ch.) | 520 |
| Hammersmith, &c., Railway Company *v.* Brand and Wife | 130 |
| Harrison, Lloyd *v.* (Ex. Ch.) | 502 |
| Haselgrove *v.* House | 101 |
| Hastings Union, Guardians of *v.* Saint James, Clerkenwell, Guardians of | 38 |
| Haughley, Overseers of, Great Eastern Railway Company *v.* | 666 |
| Hawkins and another *v.* Carr | 89 |
| Heath, Regina *v.* | 218 |
| Hibbs *v.* Ross | 534 |
| Hilton, Overseers of *v.* Overseers of Bowes | 359 |
| Holdsworth and others, M'Crea *v.* | 264 |
| Holmes and others *v.* Jaques | 376 |
| House, Haselgrove *v.* | 101 |
| Hulton and another, Worthington *v.* | 63 |
| Huntingdonshire, Justices of, Regina *v.* | 36 |

J.

| | |
|---|---|
| Jackson and another, Lloyd *v.* | 570 |
| Jaques, Holmes and others *v.* | 376 |
| Jeffries, Morris *v.* | 261 |
| Jeffs *v.* Day | 372 |
| Jennings *v.* G. N. Railway Company | 7 |

K.

| | |
|---|---|
| Keble, Swinford *v.* | 549 |
| Kelly *v.* Sherlock | 686 |
| —— *v.* Tinling | 699 |
| Kemp *v.* Halliday (Ex. Ch.) | 520 |
| —— *v.* Waddingham and another, Administrators, &c. | 355 |
| Kent, Justices of, Regina *v.* | 385 |

L.

| | |
|---|---|
| Lambarde and others, Justices of Kent, Regina *v.* | 388 |
| Le Conteur *v.* London and S.W. Railway Company | 54 |
| Lee, Inhabitants of, Regina *v.* | 241 |
| Lester, Triggs *v.* | 259 |
| Lindsey, Justices, &c. of, Regina *v.* | 68 |
| Lloyd *v.* Guibert (Ex. Ch.) | 115 |
| —— *v.* Harrison (Ex. Ch.) | 502 |
| —— *v.* Jackson and another | 570 |
| Lofthouse and Wilson, Regina *v.* | 433 |
| London and N. W. Railway Company, Lunt *v.* | 277 |

PAGE

London and S. W. Railway Company, Le Conteur *v.* 54
Lunt *v.* The London and N.W. Railway Company 277
Lynn, Ash *v.* 270

M.

M'Crea *v.* Holdsworth and others 264
Marshall *v.* The Emperor Life Assurance Society 35
Metropolitan Board of Works, The, Balls *v.* 337
Mid-Wales Railway Company, Cobb *v.* 342
Mills, Buvelot *v.* 104
Moody *v.* Corbett and others, and the L. B. and S. C. Railway Company (Ex. Ch.) 510
Morgan *v.* The Vale of Neath Railway Company 149
Morris *v.* Jeffries 261

N.

Nicholson *v.* The Guardians of the Bradfield Union 620
Northowram, Ratepayers of, Regina *v.* 110
Nott *v.* Bound 405

O.

O'Donnell, Ex parte 274

P.

Parsons and another *v.* Carr 89
Perks and another, Hadley and others *v.* 444
Phillips, Regina *v.* 648
Pledge, Balmforth *v.* 427
Polden *v.* Bastard (Ex. Ch.) 156

R.

Rand and others, Regina *v.* 230
Rankin, Wilson *v.* (Ex. Ch.) 162
Redding, Smith *v.* 489

PAGE

Reeves and another *v.* Watts 412
Regina *v.* The Inhabitants of the Parish of Ashby Folville 213
——— *v.* Overseers of Bilston 18
———, Churchward *v.* 173
——— *v.* Dodd and another 16
——— *v.* Farrer and another, Justices, &c. 558
——— *v.* The Guardians of the Glossop Union 227
——— *v.* The Local Board of Health of the Borough of Godmanchester (Ex. Ch.) 328
——— *v.* Sir George Grey, Bart. 469
——— *v.* Hall 632
——— *v.* Heath 218
——— *v.* The Justices of Huntingdonshire 36
——— *v.* The Justices of Kent 385
——— *v.* Lambarde and others, Justices of Kent 388
——— *v.* The Inhabitants of the Parish of Lee 241
——— *v.* The Justices of the parts of Lindsey 68
——— *v.* Lofthouse and Wilson 433
——— *v.* Ratepayers of Northowram 110
——— *v* Phillips 648
——— *v.* Rand and others 230
——— *v.* Saint Leonard, Shoreditch 21
——— *v.* Spurrell and Walker 72
——— *v.* Stephens 702
——— *v.* Stone 529
——— *v.* Strugnell 93
———, Winsor *v.* 289 (Ex. Ch.) 390
Rochester Pavement, &c., Commissioners, Chatham Extra, Local Board of Health of *v.* 24
Ross, Hibbs *v.* 534

S.

Saint James, Clerkenwell, Guardians of, Hastings Union, Guardians of *v.* 38

PAGE

Saint Leonard, Shoreditch, Regina *v.* 21
Saunders *v.* Baldy 87
Sherlock, Kelly *v.* 686
Smith *v.* Redding 489
Spurrell and Walker, Regina *v.* 72
Stephens, Regina *v.* 702
Stone, Regina *v.* 529
Strauss *v.* Francis 379
Strugnell, Regina *v.* 93
Suckling, Donald *v.* 585
Swinford *v.* Keble 549

T.

Tarner *v.* Walker 641
Tinling, Kelly *v.* 699
Townsend, Dearden *v.* 10
Triggs *v.* Lester 259

U.

Unwin and others *v.* Clarke 417

V.

Vale of Neath Railway Company, Morgan *v.* 149

W.

PAGE

Waddingham and another, Administrators, &c., Kemp *v.* 355
Wakefield Local Board of Health *v.* West Riding and Grimsby Railway Company 84
Walker, Tarner *v.* 641
Watts, Reeves and another *v.* 412
Weardale District Highway Board *v.* Bainbridge 396
West Riding and Grimsby Railway Company, Wakefield Local Board of Health *v.* 84
Westall, European Central Railway Company *v.* 167
Weston, Bond and another *v.* 169
Whitchurch *v.* The Board of Works for the Fulham District 233
Whitlock, Asher and Wife *v.* 1
Williams and others *v.* Evans 352
Wilson, Brabant *v.* 44
——— *v.* Rankin (Ex. Ch.) 162
Winsor *v.* Regina 289 (Ex. Ch.) 390
Wise, Coe *v.* (Ex. Ch.) 711
Wood and others *v.* Dunn 77
Worthington *v.* Hulton and another 63

# TABLE OF CASES CITED.

## A.


| | | PAGE |
|---|---|---|
| Amalia, The | 1 Moo. P. C. (N.S.) 471 | 124 |
| Angel *v.* Ihler | 5 M. & W. 600 | 427 |
| Arayo v. Currell | 1 Louis Rep. 528 | 123 |
| Armstrong *v.* Hewitt | 4 Price, 216 | 637 |
| Armytage *v.* Haley | 4 Q. B. 917 | 694 |
| Arnold *v.* Mayor of Poole | 4 M. & G. 860 | 622 |
| Aspdin *v.* Austin | 5 Q. B. 671 | 188, 191, 208 |
| Atkinson *v.* Woodall | 31 L. J. (M.C.) 174 | 526 |
| Attorney General *v.* Siddon | 1 C. & J. 220 | 707 |


## B.


| | | |
|---|---|---|
| Bainbridge *v.* Neilson | 10 East, 329 | 524 |
| Baker, Ex parte | 2 H. & N. 219; 7 E. & B. 697 | 419, 420, 422, 426 |
| Baker *v.* Lane | 3 H. & C. 544 | 630 |
| Banker's Case, The | 14 How. St. Tr. 39 | 190 |
| Barker *v.* Greenwood | 2 Y. & C. (Ex.) 414 | 354 |
| Baron de Bode's Case | 8 Q. B. 284 | 190 |
| Bartlett, Ex parte | 30 L. J. (M.C.) 65 | 561, 563, 566, 567, 568, 570 |
| ——— *v.* Lewis | 12 C. B. (N.S.) 249 | 630, 631 |
| Bartonshill Coal Company *v.* M'Guire | 3 Macq. 300 | 151 |
| ——— *v.* Reid | 3 Macq. 266 | 151 |
| Bateman *v.* Farnsworth | 29 L. J. (Ex.) 365 | 507 |
| Bayley *v.* Griffiths | 1 H. & C. 429 | 92 |
| Bear *v.* Bromley | 18 Q. B. 271 | 334 |
| Beckham *v.* Drake | 2 H. L. C. 606 | 185 |
| Belfast and Ballymena Railway Company *v.* Keyes | 9 H. L. C. 556 | 58 |
| Bell *v.* Carstairs | 14 East, 374 | 164 |
| Benham *v.* Broadhurst | 3 H. & C. 472 | 414 |
| Bennett *v.* Tocker | 3 Wood. 460 | 638 |
| Berkeley *v.* Hardy | 5 B. & C. 355 | 414 |
| Bernasconi, Ex parte | 2 G. & J. 381 | 168 |
| Bertie *v.* Beaumont | 16 East, 33 | 74 |
| Beverley *v.* Lincoln Gaslight Company | 6 A. & E. 829 | 623 |
| Bickford *v.* Darcy | Law Rep. 1 Ex. 354 | 630 |

| | | PAGE |
|---|---|---|
| Biederman *v.* Seymour | 3 Beav. 368 | 576 |
| Bilbee *v.* London, Brighton, and South Coast Railway Company | 18 C. B. (N.S.) 584 | 281 |
| Blanckenhagen *v.* Blundell | 2 B. & A. 417 | 377, 378 |
| Blasco *v.* Fletcher | 14 C. B. (N.S.) 147 | 121 |
| Blechingdon *v.* Dand | 3 New Sess. Cas. 640 | 222 |
| Bloxam *v.* Sanders | 4 B. & C. 941 | 592, 616 |
| Bodenham *v.* Pritchard | 1 B. & C. 350 | 159, 161 |
| Bonaparte, The | 8 Moo. P. C. 459 | 125 |
| Boone *v.* Eyre | 2 W. Bl. 1312 | 188 |
| Brandley *v.* South Eastern Railway Company | 12 C. B. (N.S.) 63 | 57 |
| Brierly *v.* Kendall | 17 Q. B. 937 | 597, 598 |
| Briggs *v.* Merchant Traders Ship Association | 13 Q. B. 167 | 526 |
| Brine *v.* Great Western Railway Company | 2 B. & S. 402 | 720 |
| Brittain *v.* Kinnaird | 4 B. Moo. 50; 1 B. & B. 432 | 657 |
| Broadbent *v.* Imperial Gaslight Company | 7 De G. M. & G. 436; 7 H. L. C. 600 | 140, 141, 719, 721 |
| Bromitt *v.* Moor | 9 Hare, 374 | 573 |
| Brown's Case | 2 East, P. C. 501 | 74 |
| Brown *v.* Evans | 34 L. J. (M.C.) 101 | 403, 562 |
| ——— *v.* Gracey | D. & R. (N.P.) 41 n. | 129 |
| Brownlow *v.* Metropolitan Board of Works | 16 C. B. (N.S.) 546 | 716 |
| Bruce *v.* Helliwell | 5 H. & N. 609 | 368 |
| Buchanan *v.* Parnshaw | 2 T. R. 745 | 465, 466, 467 |
| Buckle *v.* Wrightson | 34 L. J. (M.C.) 43 | 271 |
| Burgess *v.* Wickham | 3 B. & S. 669 | 165 |
| Burland *v.* Hull Local Board of Health | 3 B. & S. 271 | 66, 67 |
| Burton *v.* Powers | 26 L. J. (Ch.) 330 | 574 |
| Bush *v.* Martin | 2 H. & C. 311 | 720 |
| —— *v.* Steinman | 1 B. & P. 404 | 705 |
| Bushell *v.* Beavan | 1 Bing. N. C. 103 | 414 |
| Bywater *v.* Richardson | 1 Ad. & E. 508 | 465 |


## C.


| | | |
|---|---|---|
| Caledonian Railway Company *v.* Ogilvy | 2 Macq. 235 | 137, 139 |
| Cameron *v.* Charing Cross Railway Company | 16 C. B. (N.S.) 430 | 137 |
| Cammell *v.* Sewell | 5 H. & N. 728 | 125, 127 |
| Campbell *v.* Jones | 6 T. R. 570 | 188 |
| ——— *v.* Regina | 11 Q. B. 799 | 296, 302, 319 |
| ——— *v.* Spottiswoode | 3 B. & S. 769 | 701 |
| Carter *v.* Whalley | 1 B. & Ad. 11 | 99 |
| Carthew *v.* Edwards | 2 E. & Y. 121, Amb. 72 | 638 |
| Castellain *v.* Thompson | 13 C. B. (N.S.) 105 | 526 |
| Chamberlain *v.* West End of London and Crystal Palace Railway Company | 2 B. & S. 605 | 136, 138, 147 |
| Chapman *v.* Milvain | 5 Ex. 61 | 721 |
| Chesterfield, &c., Colliery Company *v.* Hawkins | 3 H. & C. 677 | 414 |
| Child *v.* Chamberlain | 6 C. & P. 213 | 297, 392 |
| Chinery *v.* Viall | 5 H. & N. 288 | 597, 598 |
| Church *v.* Imperial Gas Company | 6 A. & E. 846 | 623 |
| City of London Gaslight and Coke Company *v.* Nicholls | 2 C. & P. 365 | 623 |
| Clapham *v.* Atkinson | 4 B. & S. 730 | 107 |

| | | PAGE |
|---|---|---|
| Clarke *v.* Cuckfield Union | 21 L. J. (Q.B.) 349 | 620, 621, 622, 623, 627 |
| ——— *v.* St. Mary, Bury St. Edmund's | 1 C. B. (N.S.) 23 | 74 |
| ——— *v.* Watson | 18 C. B. (N.S.) 278 | 188 |
| ——— *v.* Williams | 34 L. J. (Ex.) 189 | 168 |
| Clothier *v.* Webster | 12 C. B. (N.S.) 790 | 720 |
| Cobbett *v.* Grey | 4 Ex. 729 | 517 |
| Cochrane *v.* Green | 9 C. B. (N.S.) 448 | 373 |
| Cockburn, Ex parte | 33 L. J. (Bkr.) 17 | 413, 414, 415 |
| Coggs *v.* Bernard | 2 Ld. Raym. 909 | 586, 589, 590, 594, 610, 614 |
| Conway *v.* Nall | 1 C. B. at p. 643 | 500 |
| ——— and Lynch *v.* Regina | 7 Ir. L. Rep. 149. | 296, 299, 302, 303, 306, 307, 310, 313, 314, 315, 316, 317, 319, 323, 325, 393, 395 |
| Copper Miners Company *v.* Fox | 16 Q. B. 229 | 622 |
| Corrigal *v.* London and Blackwall Railway Company | 5 M. & G. 219 | 347 |
| Costabadie *v.* Costabadie | 6 Hare, 410 | 578 |
| Coulton *v.* Ambler | 13 M. & W. 403 | 334 |
| Cowie *v.* Stirling | 6 E. & B. 333 | 377 |
| Cox *v.* Reid | Ry. & Mood. 199 | 536, 545 |
| Croft *v.* London and North Western Railway Company | 3 B. & S. 436 | 138 |
| Cunard *v.* Hyde | 2 E. & E. 1; E. B. & E. 670 | 163, 164, 165, 166 |


## D.


| | | |
|---|---|---|
| Dakin *v.* Oxley | 15 C. B. (N.S.) 646 | 119 |
| Daubigny *v.* Duval | 5 T. R. 604 | 590, 597, 612 |
| Davys *v.* Douglas | 4 H. & N. 180 | 94 |
| Dawson *v* Atty | 7 East, 367 | 164 |
| ——— *v.* Willoughby | 34 L. J. (M.C.) 37 | 214 |
| ——— *v.* Wrench | 3 Ex. 359 | 189, 209 |
| De Bouchout *v.* Goldsmid | 5 Ves. 211 | 593 |
| Deeze, Ex parte | 1 Atk. 228 | 591 |
| De Grave *v.* Mayor of Monmouth | 4 C. & P. 111 | 622, 623 |
| Demainbray *v.* Metcalfe | 2 Vern. 691; (Gilb. Eq. C. 104; 1 Eq. C. Ab. 324; Prec. Ch. 419) | 588, 589, 591 |
| Denn *v.* Gaskin | Cowp. 657 | 573, 577, 579 |
| De Ponthieu *v.* Pennyfeather | 1 Marsh. 261; 5 Taunt. 634 | 657, 661 |
| Dewhirst *v.* Jones | 3 H. & C. 60 | 413 |
| ——— *v.* Kershaw | 1 H. & C. 726 | 505 |
| Diack, Ex parte | 2 Mont. & A. 675 | 168 |
| Dickenson *v.* Valpy | 10 B. & C. 140 | 99 |
| Diggle *v.* Blackwall Railway Company | 5 Ex. 442 | 622 |
| Dixon *v.* Gayfere | 17 Beav. 421 | 4 |
| Doe *v.* Allen | 8 T. R. 497 | 573, 579 |
| —— d. Ashby *v.* Birnes | 2 C. M. & R. 23 | 575 |
| —— *v.* Barnard | 13 Q. B. 945 | 3, 4, 6 |
| —— *v.* Birchmore | 9 A. & E. 662 | 3 |
| —— *v.* Collins | 2 T. R. 498 | 159 |
| —— *v.* Dyeball | Mood. & M. 346 | 4, 5, 6 |

| | | PAGE |
|---|---|---|
| Doe *v.* Grafton | 18 Q. B. 496 | 39 |
| —— *v.* Jauncey | 8 C. & P. 99 | 3, 4 |
| —— *v.* King | 6 Ex. 791 | 516, 517 |
| —— d. Knott *v.* Lawton | 4 Bing. (N.C.) 455 | 577 |
| —— *v.* Ravell | 2 C. & J. 617 | 574 |
| —— *v.* Richards | 3 T. R. 356 | 578 |
| —— *v.* Williams | 6 B. & C. 41 | 544 |
| Duncan *v.* Findlater | 6 Cl. & F. 894 | 716 |
| Dunn *v.* Sayles | 5 Q. B. 685 | 188, 191, 208 |
| Duranty *v.* Hart | 2 Moo. P. C. (N.S.) 289 | 125 |


## E.


| | | |
|---|---|---|
| Earle *v.* Rowcroft | 8 East, 126 | 164 |
| East London Water Works Company *v.* Bailey | 4 Bing. 283 | 622 |
| Eastern Counties Railway Company *v.* Broom | 6 Ex. 314 | 708 |
| Edinburgh Railway Company *v.* Wauchope | 8 Cl. & F. 710 | 517 |
| Edwards *v.* Gabriel | 7 H. & N. 520 | 500 |
| Egerton *v.* Still | Bun. 198 | 638 |
| Elderton *v.* Emmens | 4 H. L. C. 624 | 184, 185, 188, 191, 207 |
| Evans *v.* Williams | 2 Drew. & Sm. 324 | 356 |
| Ewart *v.* Cochrane | 4 Macq. 117 | 160 |
| —— *v.* Graham | 7 H. L. C. 331 | 368 |


## F.


| | | |
|---|---|---|
| Falmouth *v.* Richardson | 3 B. & C. 837 | 335 |
| Farnworth *v.* Hyde | 18 C. B. (N.S.) 835 | 525 |
| Farrall *v.* Hilditch | 5 C. B. (N.S.) 840 | 413 |
| Farwell *v.* Boston and Worcester Railroad Corporation | 4 Metcalf. 49; 3 Macq. 316 | 154 |
| Feather *v.* Regina | 6 B. & S. 257 | 186, 190 |
| Fenn *v.* Bittleston | 7 Ex. 152 | 614, 617 |
| Fenton *v.* Trent and Mersey Navigation | 9 M. & W. 203 | 721 |
| Ferrar's Case | Sir T. Raym. at p. 84 | 298 |
| Fletcher *v.* Reid | Ry. & Mood. 202 n. | 536, 545 |
| ——— *v.* Rylands | Law Rep. 1 Ex. 265 | 706, 716 |
| Foley *v.* Parry | 5 Sim. 138; 2 My. & K. 138 | 575, 577 |
| Forrest *v.* Greenwich | 8 E. & B. 890 | 249 |
| Freard *v.* Dawson | Marshall on Insurance, 136 | 164 |
| Frost *v.* Oliver | 2 E. & B. 301 | 536, 537, 539, 543, 545, 546 |
| Fuller *v.* Redman | 26 Beav. 600 | 356, 358 |


## G.


| | | |
|---|---|---|
| Gathercole *v.* Miall | 15 M. & W. 319 | 700 |
| Gattorno *v.* Adams | 12 C. B. (N.S.) 560 | 126 |
| Gibbs *v.* Tunaley | 1 C. B. 640 | 693, 695 |

| | | PAGE |
|---|---|---|
| Glover, Ex parte | 1 G. & J. 270 | 168 |
| ——— *v.* North Staffordshire Railway Company | 16 Q. B. 912 | 137, 140 |
| Godden, Ex parte | 2 De G. J. & S. 260 | 414 |
| Goodright *v.* Barron | 11 East, 220, 223 | 573, 577, 579 |
| Graham *v.* Furber | 14 C. B. 134 | 499 |
| Gray *v.* Brassey | 15 Court of Sess. Cas. (2nd S.) 135 | 151 |
| —— *v.* Regina | 11 Cl. & F. 427 | 300, 302, 319 |
| Grayson *v.* Atkinson | 1 Wilson, 333 | 574 |
| Greathead *v.* Morley | 3 Man. & G. 139 | 368 |
| Gresty *v.* Gibson | Law Rep. 1 Ex. 112 | 412, 413, 415, 416 |
| Gurney *v.* Rawlings | 2 M. & W. 87 | 189, 191, 209 |


## H.


| | | |
|---|---|---|
| Hackwood *v.* Lyall | 17 C. B. at p. 124 | 537 |
| Haigh *v.* North Bierley Union | E. B. & E. 873 | 620, 622, 623 |
| Halhead *v.* Young | 6 E. & B. 312 | 184 |
| Hall *v.* Lund | 1 H. & C. 676 | 160 |
| —— *v.* Smith | 2 Bing. 156 | 716 |
| Hallett *v.* Dowdall | 18 Q. B. 2 | 189, 209 |
| Hamilton *v.* Mendes | 2 Burr. 1198 | 524, 526 |
| Harrhy *v.* Wall | 1 B. & A. 103 | 107 |
| Harrison *v.* Harrison | 9 Price, 89 | 296 |
| Hartfield *v.* Rotherfield | 17 Q. B. 746 | 23 |
| Hartnall *v.* Ryde Commissioners | 4 B. & S. 361 | 720 |
| Hartop *v.* Hoare | 3 Atk. 44 | 593 |
| Haythorn *v.* Bush | 2 Dowl. 641 | 507 |
| Hayward *v.* Metropolitan Railway Company | 4 B. & S. 787 | 340, 346, 347, 350 |
| Hearne *v.* Garton | 2 E. & E. 66 | 707 |
| Helliwell *v.* Eastwood | 6 Ex. 295 | 249, 254, 255 |
| Henderson *v.* Australian Royal Mail Steam Navigation Company | 5 E. & B. 409 | 621, 623 |
| Hill *v.* Cowdery | 1 H. & N. 360 | 184 |
| Hochster *v.* De la Tour | 2 E. & B. 678 | 185, 196, 208, 421 |
| Holliday *v.* St. Leonard, Shoreditch | 11 C. B. (N.S.) 204 | 716 |
| Holmes *v.* Clarke | 7 H. & N. 937 | 153 |
| ——— *v.* Tutton | 5 E. & B. 65 | 79, 81, 82 |
| Howes *v.* Ball | 7 B. & C. 481 | 613 |
| Hudson *v.* Clementson | 18 C. B. 213 | 126 |
| Hughes *v.* Chatham | 5 M. & G. 54 | 74 |
| Hunt *v.* Royal Exchange Assurance | 5 M. & S. 47 | 525, 526 |
| Hutchinson *v.* York, Newcastle, and Berwick Railway Company | 5 Ex. 343 | 152 |


## I.


| | | |
|---|---|---|
| Ibbetson *v.* Beckwith | Cases Temp. Tabbot, 157 | 577 |
| Ilderton *v.* Castrique | 14 C. B. (N.S.) 99 | 502, 504 |
| ——— *v.* Jewell | 14 C. B. (N.S.) 665; 16 C. B. (N.S.) 142 | 414, 504 |
| Irving *v.* Manning | 1 H. L. C. 287, 306, 307 | 524 |

## J.


| | | PAGE |
|---|---|---|
| Jarvis *v.* Rogers | 15 Mass. Rep. 389 | 588, 593 |
| Jennings *v.* Griffiths | Ry. & Mood. 42 | 544 |
| Job *v.* Langton | 6 E. & B. 779 | 524 |
| Johnson *v.* Stear | 15 C. B. (N.S.) 330 . 592, 594, 597, 599, 601, 603, 609 614, 616, 617, 618. | 589 |
| Jones *v.* Farrell | 1 De G. & J. 208 | 375 |


## K.


| | | |
|---|---|---|
| Keat's Case | Skinner, 667 | 302 |
| Keir *v.* Andrade | 6 Taunt. 498 | 164 |
| Kiddell *v.* Burnard | 9 M. & W. 668 | 464 |
| King *v.* Walker | 2 H. & C. 384 | 525 |
| Kinloch's Case | Foster, C. C. 16 | 296, 299, 304, 318 |


## L.


| | | |
|---|---|---|
| Lacon *v.* Higgins | D. & R. 41 n. | 129 |
| Lamprell *v.* Billericay Union | 3 Ex. 283 | 621, 622 |
| Lancaster *v.* Walsh | 4 M. & W. 16 | 644 |
| Laugher *v.* Pointer | 5 B. & C. 547 | 705 |
| Lawrence *v.* Great Northern Railway Company | 16 Q.B. 643 | 719, 721 |
| ——— *v.* Jones | Bun. 173 | 638 |
| Lay *v.* Mottram | 19 C. B. (N.S.) 479 | 413 |
| Lee *v.* Atkinson | Yelv. 172; Cro. Jac. 236 | 591, 615 |
| —— *v.* Milner | 2 M. & W. 824 | 138 |
| Legg *v.* Evans | 6 M. & W. 36 | 604, 606, 608 |
| Legge *v.* Tucker | 1 H. & N. 500 | 186 |
| Leigh *v.* Pendlebury | 15 C. B. (N.S.) 815 | 505 |
| Liddard *v.* Kain | 2 Bing. 183; 9 B. Moore, 356 | 466 |
| Liversidge *v.* Broadbent | 4 H. & N. 603 | 373 |
| London Dock Company *v.* Sinnott | 8 E. & B. 347 | 621, 622, 627 |
| London and North Western Railway Company *v.* Bradley | 6 Railway Cases, 551 | 137 |
| Longmore *v.* Elcum | 2 Y. & C. (Ch.) 363 | 578 |
| Lord Delamere's Case | 11 How. St. Tr. 561 | 296 |
| Loveacres *v.* Blight | Cowp. 352 | 573, 577, 579 |
| Lovegrove *v.* London, Brighton, and South Coast Railway Company | 16 C. B. (N.S.) 669 | 153 |
| Lozano *v.* Janson | 2 E. & E. 160 | 525, 526 |
| Lyne *v.* Wyatt | 18 C. B. (N.S.) 593 | 414 |


## M.


| | | |
|---|---|---|
| Macbeath *v.* Haldiman | 1 T. R. at p. 172 | 188 |
| M'Combie *v.* Davies | 7 East, 5 | 590, 607, 612 |
| M'Intyre *v.* Belcher | 32 L. J. (C.P.) 254 | 191 |
| M'Iver *v.* Henderson | 4 M. & S. 576 | 524 |

| | | PAGE |
|---|---|---|
| M'Naughton *v.* Caledonian Railway Company | 19 Court of Sess. Cas. (2nd S.) 271 | 152 |
| Magnay *v.* Burt | 5 Q. B. 381 | 506 |
| Magrath *v.* Hardy | 4 Bing. N. C. 782 | 80 |
| Mansel's Case | 1 Ander. 103. | 298 |
| Mansell *v.* Regina | D. & B. 375 | 296 |
| Marshalsea Case | 10 Rep. 68 | 505 |
| Martin *v.* Gribble | 3 H. & C. 631 | 414 |
| Maughan *v.* Sharpe | 34 L. J. (C.P.) 19 | 415, 416 |
| Mawby *v.* Hopkinson | 10 L. T. (N.S.) 27 | 401, 402 |
| Mayor of Blackburn *v.* Parkinson | 1 E. & E. 71. | 184 |
| ——— Ludlow *v.* Charlton | 6 M. & W. 815 | 622 |
| ——— Stafford *v.* Till | 4 Bing. 75 | 622 |
| Megginson *v.* Harper | 2 C. & M. 322; 4 Tyr. 94 | 377 |
| Mersey Docks Trustees *v.* Gibbs | Law Rep. 1 H. L. 93 | 711, 713 |
| ——— *v.* Penhallow | 715, 716, 717, 720 | |
| Mesnard *v.* Aldridge | 3 Esp. 271 | 465 |
| Metcalfe *v.* Rycroft | 6 M. & S. 75 | 414 |
| Metropolitan Railway Company *v.* Turnham | 14 C. B. (N.S.) 212 | 340 |
| Milgate *v.* Kebble | 3 M. & G. 100 | 616 |
| Mitcheson *v.* Oliver | 5 E. & B. 419 | 536, 537, 538 539, 540, 545, 546, 547 |
| Moor *v.* Denn | 2 B. & P. 427, 251 | 574 |
| —— *v.* Roberts | 2 C. B. (N.S.) 671 | 92 |
| Moore *v.* Great Southern and Western Railway Company | 10 Ir. C. L. Rep. (N.S.) 46 | 137 |
| Moran *v.* Jones | 7 E. & B. 523 | 524, 525 |
| Moreland *v.* Richardson | 24 Beav. 33 | 482 |
| Mores *v.* Conham | Owen, 123, 124 | 588, 602, 613, 616 |
| Morris *v.* Davis | 3 C. & P. 427; Com. Dig. Temps. b. 3; 2 Maddox History of the Exchequer | 296 |
| Mounson *v.* West | 1 Leon, 132; Finch, b. 4, c. 36; Jenkins, 187, case 84 | 390, 391 |
| Mumford *v.* Oxford, Worcester, and Wolverhampton Railway Company | 1 H. & N. 34 | 142 |


## N.


| | | |
|---|---|---|
| Newmarket Railway Company *v.* St. Andrews | 3 E. & B. 94 | 673 |
| New River Company *v.* Johnson | 2 E. & E. 435 | 137, 719 |
| Night *v.* Sidebotham | 2 Doug. 759 | 577 |
| Norton *v.* Nicholls | 1 E. & E. 761 | 267, 268 |
| ——— *v.* Walker | 3 Ex. 480 | 505 |
| Notley *v.* Buck | 8 B. & C. 164 | 79 |
| Nottingham *v.* Jennings | 1 P. Wms. 23 | 576 |


## O.


| | | |
|---|---|---|
| Ohrby *v.* Ryde Commissioners | 5 B. & S. 743 | 716 |
| Ostler *v* Cook | 18 Q. B. 839 | 335 |
| Owens *v.* Breese | 6 Ex. 916 | 428 |

## P.


| | | PAGE |
|---|---|---|
| Paine *v.* Strand Union | 8 Q. B. 326 | 621, 622 |
| Paradine *v.* Jane | Aleyn, 26 | 121 |
| Pardoe *v.* Price | 11 M. & W. 427 | 29 |
| Parnaby *v.* Lancaster Canal Company | 11 Ad. & E. 223 | 717 |
| Paterson *v.* Tash | 2 Str. 1178 | 590 |
| Paul *v.* James | 1 Q. B. 832 | 335 |
| Payler *v.* Hommershaw | 4 M. & S. 423 | 102 |
| Pearson *v.* Nell | 13 W. R. 967 | 537, 539 |
| Peninsular and Oriental Company *v.* Shand | 11 Jurist (N.S.) 771 | 57, 126 |
| Penny *v.* South Eastern Railway Company | 7 E. & B. 660 | 137, 140, 145 |
| Perkins' Case | Carthew, 465 | 298 |
| Peters *v.* Heyward | Cro. Jac. 682 | 601 |
| Pettinmangin, Ex parte | 4 B. & S. at p. 921 | 231 |
| Phillips *v.* Poland | Law Rep. 1 C. P. 204 | 505 |
| Pianciani *v.* London and South Western Railway Company | 18 C. B. 226 | 57, 60, 61 |
| Pickard *v.* Smith | 10 C. B. (N.S.) 470 | 715 |
| Piggot *v.* Stratton | 1 De G. F. & G. 33 | 47 |
| Pigot *v.* Cubley | 15 C. B. (N.S.) 701 | 595 |
| Poland, In re | Law Rep. 1 Ch. Ap. 356 | 505 |
| Polden *v.* Bastard | 4 B. & S. 258 | 156 |
| Pope *v.* Nickerson | 3 Story's Rep. 465 | 123 |
| Popplewell *v.* Canby | 2 Wood, 390 | 638 |
| Pordage *v.* Cole | 1 Wms. Saund. 319 d. | 184, 187, 188, 195, 207 |
| Pothonier *v.* Dawson | Holt, N. P. 383 | 606 |
| Powell *v.* Sonnett | 3 Bing. 381; in error, 1 Bligh, (N.S.) 545 | 391 |
| Press *v.* Parker | 2 Bing. 456 | 159 |
| Prestwich *v.* Poley | 18 C. B. (N.S.) 806 | 380, 382 |
| Priestley *v.* Fowler | 3 M. & W. 1 | 152 |
| Pudding Norton, In re | 33 L. J. (M.C.) 136 | 73 |
| Pyer *v.* Carter | 1 H. & N. 916 | 159, 160 |
| Pylie *v.* Stephen | 6 M. & W. 813 | 36 |


## R.


| | | |
|---|---|---|
| Railstone *v.* York, Newcastle, and Berwick Railway Company | 15 Q. B. 404 | 346, 347 |
| Ratcliff *v.* Davis | Yelv. 178; 1 Bulst. 29; Cro. Jac. 244 | 588, 590, 595 |
| Rawlings, Ex parte | 1 De G. J. & S. 225 | 414 |
| Reedie *v.* London and North Western Railway Company | 4 Ex. 244 | 706 |
| Reeves *v.* Capper | 5 Bing. N. C. 136 | 586, 601 |
| Regina: *See* Rex or Regina. | | |
| Rendall *v.* Hayward | 5 Bing. N. C. 424 | 693, 695 |
| Reuter *v.* Electric Telegraph Company | 6 E. & B. 341 | 621 |
| Rew *v.* Hutchins | 10 C. B. (N.S.) 829 | 92 |

| | | PAGE |
|---|---|---|
| Rex or Regina : | | |
| —— *v.* Almon | 5 Burr. 2686 | 708 |
| —— *v.* Archer | 3 Cox, C. C. 228 | 297 |
| —— *v.* Arnould | 8 E. & B. 550 | 561 |
| —— *v.* Askerton | 5 New Rep. 305 | 561, 562 |
| —— *v.* Mayor of Bath | 14 East, 609 | 674 |
| —— *v.* Benney | 1 B. & Ad. 684 | 438 |
| —— *v.* Biram | 17 Q. B. 969 | 347 |
| —— *v.* Bird | 2 Den. C. C. 94 | 391 |
| —— *v.* Birmingham and Gloucester Railway Company | 3 Q. B. 223 | 706 |
| —— *v.* Birmingham and Staffordshire Gas-light Company | 6 Ad. & E. 634 | 249 |
| —— *v.* Brighton | 4 E. & B. 236 | 229 |
| —— *v.* Brown | 13 Q. B. 654 | 222 |
| —— *v.* Chaplin | 1 B. & Ad. 926 | 673 |
| —— *v.* Charlesworth | 20 L. J. (M.C.) 181 | 490, 491, 492, 493 |
| —— *v.* Cheshunt | 1 B. & Ald. 473 | 74 |
| —— *v.* Chilverscoton | 8 T. R. 178 | 86 |
| —— *v.* —————— | 1 B. & S. 460 | 296, 302, 303, 306, 313, 315, 393 |
| —— *v.* Clarke | 1 East | 444 |
| —— *v.* Cobbett | 3 Burns' Just. Jurors, 974 | 296, 300, 305 |
| —— *v.* Cridland | 27 L. J. (M.C.) 28 | 562 |
| —— *v.* Davison | 2 F. & F. 250 | 296, 300, 307, 310, 315, 393 |
| —— *v.* Dixon | 3 M. & S. 11 | 705, 706 |
| —— *v.* Dodderhill | 3 M. & S. 243 | 40 |
| —— *v.* Drake | 6 M. & S. 116 | 271, 272 |
| —— *v.* Drury | 18 L. J. (M.C.) 189 | 296 |
| —— *v.* Eastrington | 5 Ad. & E. 765 | 214 |
| —— *v.* Ecclesfield | 1 B. & A. 348 | 214, 215 |
| —— *v.* Edmunds | 3 Camp. 207 | 296 |
| —— *v.* Edwards | Russ. & Ry. 224 | 296 |
| —— *v.* Ellis | Macnall, 53 | 392 |
| —— *v.* Emden | 9 East, 437 | 296 |
| —— *v.* Everist | 10 Q. B. 178 | 676 |
| —— *v.* Archdeacon of Exeter | 1 N. R. 267 | 113 |
| —— *v.* Fowler | 4 B. & A. 273 | 302 |
| —— *v.* Frere | 24 L. J. (M.C.) 71 | 13 |
| —— *v.* Great North of England Railway Company | 9 Q. B. 315 | 706, 707 |
| —— *v.* Great Western Railway Company | 6 Q. B. 179; 15 Q. B. 1085 | 672, 673 |
| —— *v.* Green | D. & B. 113 | 296 |
| —— *v.* Gutch | Mood. & M. 436 | 708 |
| —— *v.* Hanson | 4 B. & A. 519 | 271, 272, 273 |
| —— *v.* Heanor | 6 Q. B. 745 | 562, 563, 565, 568, 570 |
| —— *v.* Herstmonceaux | 7 B. & C. 551 | 40, 41, 42, 43 |
| —— *v.* Justices of Hertfordshire | 6 Q. B. 753 | 231 |
| —— *v.* Hogg | 1 T. R. 721 | 249 |
| —— *v.* Horne Tooke | 25 How. St. Tr. 128, 129 | 296 |
| —— *v.* Huggins | 2 Ld. Raym. 1574 | 302, 318, 319, 707 |
| —— *v.* Jackson | 6 Cox C. C. 525 | 297, 392 |
| —— *v.* Jeff | 2 Str. 984 | 296 |
| —— *v.* Johnson | 34 L. J. (M.C.) 85 | 561 |

| | | PAGE |
|---|---|---|
| Rex or Regina: | | |
| —— *v.* Keite | 1 Ld. Raym. 141; Comb. 406 | 296, 319 |
| —— *v.* Kell | 1 Cr. & Dix, 151 | 296 |
| —— *v.* Kelstern | 5 M. & S. at p. 138 | 74 |
| —— *v.* Kingswinford | 7 B. & C. 236 | 673, 683 |
| —— *v.* ———— | 3 E. & B. 688 | 114 |
| —— *v.* Langford | Car. & M. 602 | 426 |
| —— *v.* Leary and Cole | 3 Cr. & Dix, 212 | 296 |
| —— *v.* Leckin | 3 Cr. & Dix, 174 | 296 |
| —— *v.* Ledgingham | 1 Vintr. 97 | 296 |
| —— *v.* Mayor of Liverpool | 3 East, 86 | 214 |
| —— *v.* Locke | 3 Cr. & Dix, 393 | 296 |
| —— *v.* London, Brighton, and South Coast Railway Company | 15 Q. B. 313 | 673, 683 |
| —— *v.* London and South Western Railway Company | 1 Q. B. 558 | 683 |
| —— *v.* Lower Mitton | 9 B. & C. 810 | 677, 683 |
| —— *v.* Lyons | 9 C. & P. 555 | 392 |
| —— *v.* Machynlleth | 2 B. & C. 166 | 214 |
| —— *v.* Manchester, Sheffield, and Lincolnshire Railway Company | 4 E. & B. 88 | 531, 532 |
| —— *v.* Mawby | 6 T. R. 619 | 296 |
| —— *v.* Medley | 6 C. & P. 292 | 704, 707 |
| —— *v.* Sheriff of Middlesex | 31 L. J. (Q.B.) 261 | 531 |
| —— *v.* Miller | Cowp. 619 | 674 |
| —— *v.* Minster | 3 M. & S. 276 | 74 |
| —— *v.* Moore | 3 B. & Ad. 184 | 706 |
| —— *v.* New River Company | 1 M. & S. 503 | 673, 674 |
| —— *v.* Newton | 3 C. & K. 87 | 390 |
| —— *v.* ———— | 13 Q. B. 716 | 266, 299, 301, 307, 310, 322, 393 |
| —— *v.* North Staffordshire Railway Company | 3 E. & E. 392 | 248, 672, 676 |
| —— *v.* O'Donnell | 7 Cox, C. C. 337 | 297 |
| —— *v.* Owen | 9 C. & P. 83 | 297 |
| —— *v.* Oxford | 13 East, at p. 416, note b. | 296 |
| —— *v.* Parkyn | 1 B. & Ad. 690 | 438 |
| —— *v.* Pedley | 1 A. & E. 822 | 705, 706 |
| —— *v.* Pease | 4 B. & Ad. 30 | 140 |
| —— *v.* Perkins | Carth. 465 | 295 |
| —— *v.* Pugh | 1 Dougl. 188 | 222 |
| —— *v.* Ragley | 12 Mod. 409 | 215 |
| —— *v.* Reeves | W. Kelynge, 196 | 638 |
| —— *v.* Dean of Rochester | 17 Q. B. 1 | 231, 233 |
| —— *v.* Rotherham Local Board | 8 E. & B. 906 | 65, 67 |
| —— *v.* Rowland | Ry. & M. 401 | 392 |
| —— *v.* Russell | 3 E. & B. 942 | 707, 709 |
| —— *v.* St. Giles, Cambridge | 5 M. & S. 260 | 214, 215 |
| —— *v.* ————, Cripplegate | 4 B. & S. 509 | 39, 41, 43 |
| —— *v.* St. Leonard, Shoreditch | 1 Law Rep. (Q.B.) 21 | 229 |
| —— *v.* Scalbert | 2 Leach, C. C. 620 | 296 |
| —— *v.* Sheen | 2 C. & P. 634 | 296 |
| —— *v.* Shiles | 1 Q. B. 919 | 648, 652, 654, 656, 659, 664 |
| —— *v.* Slythe | 6 B. & C. 240 | 438 |
| —— *v.* Southampton Dock Company | 14 Q. B. 587, 610 | 248, 249, 250, 255 |
| —— *v.* South Shields | 3 E. & B. 599 | 401, 402 |

| | | PAGE |
|---|---|---|
| Rex or Regina: | | |
| —— *v.* Stannard | 33 L. J. (M.C.) 61; L. & C. 349 | 95 |
| —— *v.* Stapleton | 1 E. & B. 766 | 228 |
| —— *v.* Stevenson | 2 Leach, C. C. 546 | 296 |
| —— *v.* Stewart | 1 Cox, C. C. 174 | 297 |
| —— *v.* Stokes | 6 C. & P. 151. | 296 |
| —— *v.* Stone | 6 T. R. 527 | 301 |
| —— *v.* Stoughton | 2 Wms. Saund. 159 b. | 214 |
| —— *v.* Stourbridge | 34 L. J. (M.C.) 179 | 23, 229 |
| —— *v.* Streek | 2 C. & P. 413 | 296 |
| —— *v.* Stubbs | 2 T. R. 395 | 73, 74 |
| —— *v.* Surrey | 21 L. J. (M.C.) 195 | 570 |
| —— *v.* Tacolnestone | 12 Q. B. 157 | 229 |
| —— *v.* Trevenen | 2 B. & A. 339 | 437 |
| —— *v.* Wade | 1 Mood. C. C. 86 | 296 |
| —— *v.* Warminster | 6 B. & C. 77 | 40 |
| —— *v.* Justices of Warwickshire | 28 L. J. (M.C.) 249 | 386, 387 |
| —— *v.* Westbrook | 10 Q. B. 178 | 675 |
| —— *v.* White | 4 Q. B. 101 | 397, 401, 402, 404 |
| —— *v.* Whitmarsh | 15 Q. B. 600 | 334 |
| —— *v.* Wilkes | 4 Burr. 2527 | 391 |
| Rhymney Railway Company *v.* Taff Vale Railway Company | 29 Beav. 153 | 9 |
| Richards *v.* London, Brighton, and South Coast Railway Company | 7 C. B. 839 | 56 |
| Richardson *v.* South Eastern Railway Company | 11 C. B. 154; in error, 15 C. B. 810. | 350 |
| Ricket *v.* Metropolitan Railway Company | 5 B. & S. 149 | 137, 147 |
| Rider *v.* Wood | 2 E. & E. 338. | 421, 424, 425 |
| Rigby, Ex parte | 33 L. J. (Ch.) 149 | 356 |
| Robertson *v.* Jackson | 2 C. B. 412 | 126 |
| Robinson *v.* Rutter | 4 E. & B. 954 | 353 |
| Rochdale Canal Company *v.* King | 14 Q. B. 122 | 721 |
| Rookwood's Case | 13 How. St. Tr. 139 | 296 |
| Rosetto *v.* Gurney | 11 C. B. 176 | 524 |
| Roux *v.* Salvador | 3 Bing. N. C. 266 | 525 |
| Rowland's Case | Ry. & Mood. 401 | 297 |
| Ruck *v.* Williams | 3 H. & N. 308 | 716 |
| Rudd's Case | 1 Leach, C. C. 115 | 391 |
| Rutter *v.* Chapman | 8 M. & W. 1 | 471 |
| Ryall *v.* Rolle | 1 Atk. 164 | 586, 601 |


## S.


| | | |
|---|---|---|
| Saffery *v.* Jones | 2 B. & Ad. 598 | 505 |
| St. John *v.* Abbott | Barnes, 441 | 296 |
| St. Pancras *v.* Batterbury | 2 C. B. (N.S.) 477 | 239 |
| Salisbury *v.* Great Northern Railway Company | 5 C. B. (N.S.) 174 | 517 |
| Salter *v.* Kidgly | Carth. 77 | 414 |
| Sanders *v.* St. Neot's Union | 8 Q. B. 810 | 621, 623 |
| Scott *v.* Avery | 5 H. L. C. 810, 811 | 188, 191 |
| —— *v.* Washington | 2 Inst. 673 | 414 |
| Scudamore *v.* Vandersteine | 13 W. R. 939 | 491, 492, 493 |
| Searle *v.* Lindsay | 11 C. B. (N.S.) 429 | 152 |
| Senior *v.* Ward | 1 E. & E. 385 | 153 |

| | | PAGE |
|---|---|---|
| Shea *v.* Regina | 12 Ir. L. R. 153 | 391 |
| Sherborn *v.* Wells | 3 B. & S. 784 | 262, 263 |
| Shield's Case | 28 How. St. Tr. 619 | 296, 299 |
| Shutt *v.* Lewis | 5 Esp. 128 | 95 |
| Simonds *v.* White | 2 B. & C. 805 | 126 |
| Sir Percy Cresby's Case | Noy. 154, cited 2 Hale, 234 | 392 |
| Smart *v.* Sandars | 3 C. B. 380; 5 C. B. 895 | 608 |
| —— *v.* West Ham Union | 10 Ex. 867, at p. 875 | 621, 622 |
| Smith, Ex parte | 1 B. & S. 412 | 471 |
| —— *v.* Coffin | 2 H. Bl. 444 | 577 |
| —— *v.* Moore | 1 C. B. 438 | 643 |
| —— *v.* Robertson | 2 Dow. 474 | 524 |
| South Eastern Railway Company *v.* Richardson | 15 C. B. 810 | 340, 346 |
| —— *v.* Dorking | 3 E. & B. 491 | 674 |
| Southampton and Itchen Bridge Company *v.* Southampton Local Board of Health | 8 E. & B. 801, 812 | 715, 717, 719 |
| Southcote's Case | 4 Rep. 83 b | 595 |
| Spong *v.* Hogg | 2 W. Bl. 802 | 296 |
| Stapley *v.* London, Brighton, and South Coast Railway Company | Law Rep. 1 Ex. 21 | 280, 281, 282, 284, 286 |
| Stern *v.* Sevastopulo | 14 C. B. (N.S.) 737 | 630, 632 |
| Stevens *v.* Midland Counties Railway Company | 10 Ex. 352 | 708 |
| Stirling *v.* King | 3 Wood, 87 | 638 |
| Stockport, Timperley, and Altringham Railway Company | 33 L. J. (Q.B.) 251 | 138, 140, 144 |
| Stone *v.* Cartwright | 6 T. R. 411 | 716 |
| Storer *v.* Gordon | 3 M. & S. 308 | 414 |
| Storm *v.* Stirling | 3 E. & B. 832 | 377 |
| Stracey *v.* Nelson | 12 M. & W. 535 | 334 |
| Stuart, Ex parte | 33 L. J. (Bkr.) 4 | 507 |
| —— *v.* Powell | 1 B. & Ad. 266 | 164 |
| Stubley *v.* London and North Western Railway Company | Law Rep. 1 Ex. 13 | 280, 281 |
| Sunderland, Overseers of *v.* Sunderland Union | 18 C. B. (N.S.) 531 | 223, 368 |
| Swaine *v.* Pern | 1 Wood, 341 | 638 |
| Swinfen *v.* Lord Chelmsford | 5 H. & N. 890, at p. 922 | 380, 382, 383, 384 |
| —— *v.* Swinfen | 1 C. B. (N.S.) 364; 24 Beav. 549; 2 De G. & J. 381 | 380, 383 |
| Sykes *v.* Giles | 5 M. & W. 645 | 353, 354, 355 |
| Symons *v.* George | 3 H. & C. 68 | 80 |


## T.


| | | |
|---|---|---|
| Tapling *v.* Ward | 6 H. & N. 749 | 630 |
| Tenant *v.* Goldwin | 1 Salk. 360 | 706 |
| Thomas *v.* Hudson | 14 M. & W. 353 | 505 |
| Thorold *v.* Smith | 11 Mod. 87 | 354 |
| Thorp *v.* Owen | 2 Hare, 607 | 575 |
| Tilbury *v.* Brown | 30 L. J. (Q.B.) 46 | 79, 81, 82 |
| Tinkler *v.* Rowland | 4 A. & E. 868 | 391 |
| Tobin *v.* Regina | 16 C. B. (N.S.) 310, 347 | 186, 190 |
| Townsend *v.* Reed | 30 L. J. (M. C.) 223 | 389 |

| | | PAGE |
|---|---|---|
| Tresidder, In re | 1 Law Rep. 1 Ch. Ap. 21 | 509 |
| Trustees of Sunk Island Turnpike Road *v.* Patrington | 1 B. & S. 747 | 30 |
| Tulk *v.* Moxhay | 2 Phillips, 774 | 47, 48 |
| Turberville *v.* Stampe | 1 Ld. Raym. 264 | 705 |
| Turner, In re | 33 L. J. (Ch.) 232 | 357 |
| Turner's Case | 9 Q. B. 80 | 424, 425 |


## U.


| | | |
|---|---|---|
| Udell *v.* Atherton | 7 H. & N. 172 | 164 |
| Ughtred's Case | 7 Rep. 9 b. | 188 |


## W.


| | | |
|---|---|---|
| Walker *v.* Great Western Railway Company | 29 L. J. (M.C.) 107 | 389 |
| ——— *v.* Nevill | 3 H. & C. 403 | 168 |
| Waller *v.* South Eastern Railway Company | 2 H. & C. 102 | 152, 153 |
| Walmsley *v.* Milne | 7 C. B. (N.S.) 115 | 251, 252, 256 |
| Waugh *v.* Carver | 1 Sm. L. C. 734 | 98 |
| Welch *v.* Nash | 8 East, 394 | 648, 655, 657, 658, 662, 664 |
| Wellington *v.* Whitchurch | 4 B. & S. 100 | 229 |
| Westoby *v.* Day | 2 E. & B. 620 | 80 |
| West Riding and Grimsby Railway Company *v.* Wakefield Local Board | 33 L. J. (M.C.) 174 | 84 |
| Wharton *v.* Walker | 4 B. & C. 163 | 373 |
| Whately *v.* Crowter | 5 E. & B. 709 | 92 |
| Wheatcroft *v.* Forster | E. B. & E. 737 | 428 |
| Wheeler *v.* Overseers of Burmington | 29 L. J. (M.C.) 175 n. | 389 |
| Whitbread and Fenwick's Case | 7 How. St. Tr. 79 | 296 |
| Whitbread's Case | 7 How. St. Tr. 79, 311 | 298 |
| Whitfield *v.* South Eastern Railway Company | E. B. & E. 115 | 708 |
| Whitmore *v.* Turquand | 3 De G. F. & J. 107 | 107 |
| Wiggett *v.* Fox | 11 Ex. 832 | 153 |
| Willesden *v.* Paddington | 3 B. & S. 593 | 40, 41, 42 |
| Williams *v.* Adams | 2 B. & S. 312 | 562, 567 |
| ——— *v.* Carwardine | 4 B. & Ad. 621 | 644 |
| ——— *v.* Pritchard | 4 T. R. 2 | 222 |
| Wilson *v.* Abbott | 3 B. & C. 88 | 40 |
| Winch *v.* Keeley | 1 T. R. 619 | 374 |
| Windsor, In re | 1 New Rep. 230 | 505 |
| Winsor *v.* Regina | Law Rep. 1 Q. B. 289 | 393 |
| Withers *v.* Reynolds | 2 B. & Ad. 882 | 421 |
| Wodehouse *v.* Farebrother | 5 E. & B. 277 | 373, 374 |
| Wolverhampton Waterworks Company *v.* Hawkesford | 28 L. J. (C.P.) 242 | 184 |
| Wood *v.* Copper Miners of England | 7 C. B. 906 | 184 |
| ——— *v.* Rider | 2 E. & E. 338 | 426 |
| Woodard *v.* Eastern Counties Railway Company | 30 L. J. (M.C.) 196 | 9 |
| Wormwell *v.* Hailstone | 6 Bing. 668 | 715 |
| Worthington *v.* Ludlow | 2 B. & S. 508 | 64 |

| | | PAGE |
|---|---|---|
| Wright *v.* Elderton | 1 Wood. 518 | 638 |
| ——— *v.* Frant | 4 B. & S. 118 | 654, 659, 663 |

Y.

| | | |
|---|---|---|
| Yates *v.* Nash | 8 C. B. (N.S.) 581 | 377 |
| Youle *v.* Mappin | 6 H. & N. 753 | 419, 420, 422, 424 |
| Young *v.* Davis | 7 H & N. 760 | 715 |

Z.

| | | |
|---|---|---|
| Zychlinski *v.* Maltby | 10 C. B. (N.S.) 838 | 92 |

# CASES

DETERMINED BY THE

# COURT OF QUEEN'S BENCH

AND BY THE

# COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

## MICHAELMAS TERM, XXIX VICTORIA.

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### ASHER AND WIFE *v.* WHITLOCK.

1865
*Nov.* 3.

*Ejectment—Title by mere Possession—Devisable Interest in Land.*

A person in possession of land without other title has a devisable interest; and the heir of his devisee can maintain ejectment against a person who has entered upon the land, and cannot shew title or possession in any one prior to the testator.

W. in 1842 inclosed some waste land; in 1850 he inclosed more land adjoining, and built a cottage; he occupied the whole till 1860, when he died, having devised it to his wife, so long as she remained unmarried, with remainder to his daughter in fee. On his death, the widow and daughter continued to reside on the property, and in 1861 the defendant married the widow, and came to reside with them. Early in 1863 the daughter died, aged eighteen years, and the mother died soon after. The defendant continued to occupy the property, and in 1865 the daughter's heir-at-law brought ejectment against him:—

*Held*, that the plaintiff was entitled to recover the whole property.

EJECTMENT for a cottage, garden, and premises, situate at Keysoe Row, in the parish of Keysoe, in the county of Bedford; the writ stated that the female plaintiff claimed possession as heir-at-law of Mary Ann Williamson, an infant deceased.

The defendant defended for the whole.

At the trial before Cockburn, C.J., at the last Bedfordshire

1865

ASHER v. WHITLOCK.

Spring Assizes, the following facts appeared in evidence. About Michaelmas, in the year 1842, Thomas Williamson inclosed from the waste of a manor a piece of land by the side of the highway; and in 1850, he inclosed more land adjoining, and built a cottage; the whole being the land as described and claimed in the writ. He occupied the whole till his death in 1860. By his will he devised the whole property, describing it as "a cottage and garden, in Keysoe Row, in which I now dwell," to his wife Lucy Williamson, for and during so much only of her natural life as she might remain his widow and unmarried; and from and after her decease, or second marriage, whichever event might first happen, to his only child Mary Ann Williamson, in fee. After the death of Thomas Williamson, his widow remained in possession with the daughter, and in April, 1861, married the defendant; and from that time they all three resided on the property till the death of the daughter, aged eighteen years, in February, 1863. On her death, the defendant and his wife, the widow of the testator, continued to reside on the premises; the widow died in May, 1863, and the defendant still continued to occupy.

The female plaintiff is the heir-at-law of the testator's daughter Mary Ann Williamson. The writ was issued 11th of April, 1865.

These facts being undisputed, the Chief Justice directed a verdict for the plaintiff for the whole of the property claimed; with leave to move to enter the verdict for the defendant, on the ground that the testator had no devisable interest in any part of the property.

A rule *nisi* was afterwards obtained to enter the verdict for the defendant, on the ground that no title in the plaintiffs was shewn to either portion of the land enclosed.

*Markby* (Nov. 2nd), shewed cause. The testator, at the time of his death, had acquired no title by lapse of time; and the point made and reserved at the trial was, that the testator being only a trespasser in possession, had no devisable interest; that his interest was at most that of a tenant at will only; and that the devisee, if in possession, was only a new trespasser. But the authorities are conclusive to shew that a person in peaceable

possession of land has, as against every one but the true owner, an interest capable of being inherited, devised, or conveyed. In *Doe* v. *Jauncey*, (1) which was also the case of an inclosure from the roadside, a somewhat similar objection was taken; but Coleridge, J., said: "The moment the father had taken the land, if he died, it would (provided the owner did not interfere) descend to his son." In *Doe* v. *Barnard*, (2) a distinction is clearly drawn by the court between persons who succeed each other in possession, claiming one from the other by descent, devise, or conveyance, and persons who succeed each other in possession, there being no such relation between them. The same doctrine is recognised in *Doe* v. *Birchmore*. (3) Moreover, in this case, the plaintiff was not bound to shew any title at all as against the defendant. The defendant must be taken on the facts to have entered by the daughter's permission, whose title, therefore, he cannot dispute, So neither can he dispute the title of the female plaintiff, the daughter's heir-at-law. *Doe* v. *Birchmore* (3) is a direct authority on this point. There the defendant had come in as the servant of the testator, who was himself only tenant at will; and in ejectment brought by the devisee against the defendant, who remained in possession after the death of the testator, the court held that the defendant, the servant, could not compel the devisee to prove that the testator had title; and that it was sufficient to shew that the defendant came in under the testator.

*Merewether* (Nov. 2nd and 3rd), in support of the rule. As to the point last made, the defendant did not come in under the plaintiff's title, that is under the will, but adversely to it; for at the very moment of the marriage, the estate of the widow ceased; and the defendant entered as a wrong-doer.

[COCKBURN, C.J. The widow had rightful possession, which became wrongful on her marriage; but she had the same actual possession. She, therefore, coming in under the will, cannot dispute title claimed under it, and by means of the marriage her possession became that of the defendant; if she cannot dispute the validity of the will, neither can he.]

(1) 8 C. & P. 99, 102. (2) 13 Q. B. 945, 952; 18 L. J. (Q. B.) 306.
(3) 9 Ad. & E. 662, 667.

1865

ASHER v. WHITLOCK.

When the defendant entered, the wife being already married had ceased to hold under the will.

[MELLOR, J. The defendant's contention is, that the woman being a free agent, could throw up her estate, and that the defendant, coming in after the marriage, came in as a wrong-doer. COCKBURN, C.J. The widow, after her second marriage, would not be a wrong-doer in the sense of a trespasser.]

The defendant cannot be said to come in under the will, for he entered and took possession in spite of the will.

[COCKBURN, C.J. Why are we to assume his possession was in spite of the will? he goes into the cottage, and lives with the mother and daughter, who claim under the will.]

Secondly, assuming the defendant's possession to be adverse to the will, the case is that of two trespassers, and in such a case, the one last in possession is entitled to keep the land until the person having title ejects him; and the devise of the first confers no title on his devisee, so as to enable her or her heir to maintain ejectment against the present possessor.

[COCKBURN, C.J. Under the old law, a disseisor had good title against all but the disseisee; and if the disseisor died before entry by the disseisee, the latter's entry was tolled, and he was driven to his real action.]

This is not the case of a disseisor. In *Doe* v. *Barnard*, (1) a prior possession being shewn, the plaintiff, who had only a title from mere possession for less than twenty years, was held incapable of maintaining her action of ejectment. In such a case, any one getting possession, without force or fraud, can maintain his possession. In *Dixon* v. *Gayfere*, (2) where there had been several successive and independent occupiers, all without title, and the possession ultimately came to the court, the Master of the Rolls decreed possession to the *last* occupier, expressly on the ground that at law he could have maintained his possession against all but the true owner, who in that case was barred by lapse of time.

[COCKBURN, C.J. The Master of the Rolls may be right in equity, but I doubt his being right in law. In *Doe* v. *Dyeball*, (3) Lord Tenterden held, that possession for one year by the plaintiff

(1) 13 Q. B. 945; 18 L. J. (Q. B.) 306. (2) 17 Beav. 421.
(3) Mood. & M. 346.

was sufficient, to maintain ejectment against a person who came and turned him out, without any further proof of title.]

In that case the possession of the defendant was obtained by force. Here it was simply adverse.

[COCKBURN, C.J. A person being peaceably in possession of a house, a person, going in and taking possession without his leave, commits a trespass, and all trespass implies force in the eye of the law.]

COCKBURN, C.J. I am of opinion that this rule should be discharged. The defendant, on the facts, is in this dilemma; either his possession was adverse, or it was not. If it was not adverse to the devisee of the person who inclosed the land, and it may be treated as a continuance of the possession which the widow had and ought to have given up, on her marriage with the defendant, then, as she and the defendant came in under the will, both would be estopped from denying the title of the devisee and her heir-at-law. But assuming the defendant's possession to have been adverse, we have then to consider how far it operated to destroy the right of the devisee and her heir-at-law. Mr. Merewether was obliged to contend that possession acquired, as this was, against a rightful owner, would not be sufficient to keep out every other person but the rightful owner. But I take it as clearly established, that possession is good against all the world except the person who can shew a good title; and it would be mischievous to change this established doctrine. In *Doe* v. *Dyeball* (1) one year's possession by the plaintiff was held good against a person who came and turned him out; and there are other authorities to the same effect. Suppose the person who originally inclosed the land had been expelled by the defendant, or the defendant had obtained possession without force, by simply walking in at the open door in the absence of the then possessor, and were to say to him, "You have no more title than I have, my possession is as good as yours," surely ejectment could have been maintained by the original possessor against the defendant. All the old law on the doctrine of disseisin was founded on the principle that the disseisor's title was good against all but the disseisee. It is too clear to admit of doubt, that if the

(1) Mood. & M. 346.

1865

ASHER v. WHITLOCK.

devisor had been turned out of possession he could have maintained ejectment. What is the position of the devisee? There can be no doubt that a man has a right to devise that estate, which the law gives him against all the world but the true owner. Here the widow was a prior devisee, but *durante viduitate* only, and as soon as the testator died, the estate became vested in the widow; and immediately on the widow's marriage the daughter had a right to possession; the defendant however anticipates her, and with the widow takes possession. But just as he had no right to interfere with the testator, so he had no right against the daughter, and had she lived she could have brought ejectment; although she died without asserting her right, the same right belongs to her heir. Therefore I think the action can be maintained, inasmuch as the defendant had not acquired any title by length of possession. The devisor might have brought ejectment, his right of possession being passed by will to his daughter, she could have maintained ejectment, and so therefore can her heir, the female plaintiff. We know to what extent encroachments on waste lands have taken place; and if the lord has acquiesced and does not interfere, can it be at the mere will of any stranger to disturb the person in possession? I do not know what equity may say to the rights of different claimants who have come in at different times without title; but at law, I think the right of the original possessor is clear. On the simple ground that possession is good title against all but the true owner, I think the plaintiffs entitled to succeed, and that the rule should be discharged.

MELLOR, J. I am of the same opinion. It is necessary to distinguish between the case of the true owner and that of a person having no title. The fact of possession is *primâ facie* evidence of seisin in fee. The law gives credit to possession unless explained; and Mr. Merewether, in order to succeed, ought to have gone on and shewn the testator's title to be bad, as that he was only tenant at will, but this he did not do. In *Doe* v. *Dyeball* (1) possession for a year only was held sufficient against a person having no title. In *Doe* v. *Barnard* (2) the plaintiff did not rely on her own possession merely, but shewed a prior possession in her husband, with whom she was unconnected in point of title. Here the first

(1) Mood & M. 346. (2) 13 Q. B. 945; 18 L. J. (Q. B.) 306.

1865

ASHER v. WHITLOCK.

possessor is connected in title with the plaintiffs; for there can be no doubt that the testator's interest was devisable. In the common case of proving a claim to landed estate under a will, proof of the will and of possession or receipt of rents by the testator is always *primâ facie* sufficient, without going on to shew possession for more than twenty years. I agree with the Lord Chief Justice in the importance of maintaining, that possession is good against all but the rightful owner.

LUSH, J., concurred.

*Rule discharged.*

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JENNINGS *v.* THE GREAT NORTHERN RAILWAY COMPANY.

*Nov.* 4.

*Railway Company—By-law—Breach of Contract.*

A by-law of the defendants, a railway company, was as follows: "No passenger will be allowed to enter any carriage without having first paid his fare and obtained a ticket. Each passenger, on payment of his fare, will be furnished with a ticket, which such passenger is to shew when required, and to deliver up, before leaving the company's premises, upon demand." The plaintiff took tickets for himself, his servants, and horses, by a particular train, on the defendants' railway. The train was afterwards divided into two. The plaintiff travelled in the first train, taking all the tickets with him. When the second train with the servants and horses was about to start, the plaintiff's servants were required to produce their tickets, and on their being unable to do so, the defendants refused to carry them:—

*Held*, in an action by the plaintiff for not carrying his servants, that as the defendants contracted with the plaintiff, and delivered the tickets to him and not to the servants, the defendants could not, under the by-law, justify their refusal to carry.

THE declaration contained several counts; the second only is material, and was for not carrying the servants of the plaintiff from Lincoln to Peterborough within a reasonable time, pursuant to their contract with him.

The defendants pleaded:—

Fifthly, to the 2nd count: that by one of their by-laws, made under their Act of Parliament, and of which the plaintiff had due notice, it was ordered as follows: "No passengers will be allowed to enter any carriage used on the railway, or to travel therein upon the railway, without having first paid his fare, and obtained a ticket; each passenger on payment of his fare will be

1865

JENNINGS v. GREAT NORTHERN RAILWAY CO.

furnished with a ticket specifying the class of carriage, and the distance for which the fare had been paid, which ticket such passenger is to shew, when required by the guard in charge of the train, and to deliver up before leaving the company's premises, upon demand, to the guard, or any other servant of the company duly authorized to collect tickets." That the servants of the plaintiff had not obtained tickets, and could not produce the same pursuant to the said by-laws, whereupon the defendants refused to carry the plaintiff's servants.

The cause was tried at the Cambridgeshire Summer Assizes, before Erle, C.J., and the following facts were proved: On the 25th of February the plaintiff, who was an owner and trainer of race-horses, was desirous of proceeding with some horses from Lincoln to Peterborough, by the six o'clock evening train, on the defendants' railway. He took a first-class ticket for himself, three third-class tickets for three boys who attended on the horses, and a ticket for three horses; the boys were to travel in the horse-boxes with the horses. The six o'clock train was one which conveyed both passengers and horses, and being considered by the defendants' servants too long to be safe, it was divided into two; the first train consisted of the carriages with passengers, and the other of horse-boxes only. The plaintiff travelled by the first train, taking with him, as well as his own ticket, the tickets he had taken for the boys, and the ticket for the horses. After the departure of the first train, the three boys were asked to produce their tickets, and being unable to do so, were prevented by the company's servants from proceeding with the horses.

The company relied upon their by-law (which was admitted to be in the terms stated in the 5th plea), as justifying them in refusing to allow the three boys to travel without the production of their tickets.

The Chief Justice told the jury that if they believed that the plaintiff had taken the tickets for the boys and horses, to find a verdict for him; and reserved leave to move to enter a verdict for the defendants on the 5th plea, if there was evidence authorizing the jury to find a verdict for the defendants, and not authorizing them to find a verdict for the plaintiff.

The jury returned a verdict for the plaintiff for 5*l.* 12*s.*

*Keane, Q.C.* (*Markby* with him), moved for a rule pursuant to the leave reserved. Every person intending to travel by the defendants' railway, and who takes a ticket for that purpose, takes it subject to the by-laws of the company: the by-law set out in the 5th plea renders it compulsory for each passenger to shew his ticket when required by the guard in charge of the train; the evidence shews that the plaintiff's servants could not produce their tickets when demanded, therefore the defendants were relieved from their liability to carry them, and were justified in refusing to allow them to enter the horse-boxes. The by-law remains in force, whatever may be the practice as to its relaxation: it was so held in *The Rhymney Railway Company* v. *The Taff Vale Railway Company.* (1)

[COCKBURN, C.J. If the company had expressly assented to the master keeping the tickets, then his servants could not be turned out.]

It is a condition precedent to the company carrying the passenger, that he should produce his ticket. The contract is to carry on the terms contained in the by-law.

[SHEE, J. Is not the contract made with the master?]

Even if it were, the same result would follow. In *Woodard* v. *The Eastern Counties Railway Company,* (2) Wightman, J., sitting in the Bail Court, held that under a similar by-law, the holder of an annual ticket was bound to produce his ticket on demand, although the contract as to an annual ticket was quite inconsistent with the terms of the by-law as to delivering up the ticket.

COCKBURN, C.J. We are of opinion that there should be no rule. It is unnecessary to determine whether, if the company had given the tickets to the boys, and the boys had not produced their tickets, it would have been competent for the company to have turned them out of the carriage. The ground on which we proceed is that the by-law is established for the protection of the company; and to avail themselves of it they must keep strictly within its provisions. Here they do not do so; they delivered the tickets to the master, and are not in a position to enforce the by-

(1) 7 Jur. N. S. 202; 29 Beav. 153. (2) 30 L. J. (M. C.) 196.

1865

JENNINGS v. GREAT NORTHERN RAILWAY CO.

law, by requiring the boys to produce the tickets. The company entered into a contract, not with the boys, but with their master, and he was entitled to have the boys carried as passengers to Peterborough. The company have broken that contract, and they must take the consequence of their act.

MELLOR, SHEE, and LUSH, JJ., concurred.

*Rule refused.* (1)

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*Nov.* 11.

DEARDEN, APPELLANT, TOWNSEND, RESPONDENT.

*Railway Company—By-law, validity and construction of—Travelling without a Ticket*—8 *Vict. c.* 20, *ss.* 103 & 109.

By a by-law of a railway company, no passenger was to be allowed to enter or travel in a carriage without having paid his fare and obtained a ticket, which the passenger was to shew whenever required, and give up on demand before leaving the company's premises. And any passenger not so producing or delivering up his ticket was to be required to pay the fare from the place whence the train originally started, or forfeit a sum not exceeding forty shillings:—

*Held*, that this by-law only applied to the case of a person having and wilfully refusing to produce or give up his ticket, and not to the case of a person travelling without having paid for and obtained a ticket, with no intention to defraud the company.

*Held* also, that if the by-law extended to the latter case, it would have been illegal and void under the 8 Vict. c. 20, s. 109, as repugnant to section 103, which makes a fraudulent intention the gist of the offence of travelling without having paid the fare.

CASE stated by Justices under 20 and 21 Vict. c. 43.

George Dearden, the appellant, is the station-master of the Lancashire and Yorkshire Railway Company at their Newchurch station, in Rossendale, in the county of Lancaster. Joshua Townsend, the respondent, is a gentlemen residing at Horne, in Rossendale.

An information preferred by the appellant against the respondent was heard at the Petty Sessions at Rawtenstall on the 29th of October, 1864. The information alleged that the respondent, being a passenger upon the railway of the Yorkshire and Lancashire Railway Company, did not, on being required so to do by the servant of the company authorized to collect the tickets, produce and deliver up, before leaving the company's premises,

(1) See the next case.

upon demand, at the Newchurch station, his ticket as a passenger by the railway from the Ewood Bridge station to the Newchurch station. Nor did the respondent pay the fare from the place whence the train originally started, to wit, from Salford, on being required so to do, contrary to the by-laws made pursuant to the several statutes relating to the said company.

The Lancashire and Yorkshire Railway Company have duly made and published, under the various statutes relating to their railway, by-laws for the regulation of their various lines, of which the following is one:—"By-law 2. No passenger will be allowed to enter any carriage used on the railway, or to travel therein upon the railway, without having first paid his fare and obtained a ticket, or (as the case may be) without having paid for or obtained a contract or season ticket, giving him authority to travel during a stipulated period of time. Each passenger, on payment of his fare, or the price of his contract or season ticket, will be furnished with a ticket specifying the class of carriage, and the distance for which, or places for travelling between which, the payment has been made, which ticket (whether a contract or season ticket, or otherwise) such passenger is to shew whenever required by the guard in charge of the train, or some other servant of the company, and which ticket (if other than a contract or season ticket) such passenger is also to deliver up before leaving the company's premises, upon demand of the guard or other servant of the company authorized to collect tickets. Any passenger not producing his ticket as aforesaid (whether it be a contract or season ticket, or otherwise), or any passenger not delivering up his ticket as aforesaid (if it be other than a contract or season ticket) will be required to pay the fare from the place whence the train originally started, and in default of payment thereof, shall forfeit and pay a sum not exceeding 40s."

One of the company's lines runs from Salford to Newchurch; and between Salford and Newchurch is the Ewood Bridge station, and from this station the company had been in the habit of issuing return tickets at reduced fares to Salford and back. The respondent, on the day charged in the information, took at Ewood Bridge a first-class return ticket thence to Salford and

1865

DEARDEN v. TOWNSEND.

back. He travelled to Salford, and on the return journey, instead of getting out at Ewood Bridge and delivering up his return ticket at that station, he proceeded, in company with a friend to Newchurch, without rebooking or obtaining a fresh ticket, or the leave of any of the company's officers. No demand was made upon him at Ewood Bridge by any person for the production or delivery of any ticket. On the arrival of the train at Newchurch, the respondent produced and delivered up to the authorized servant of the company his return ticket from Salford to Ewood Bridge, and tendered in addition the full local fare charged by the company for a first-class passenger between Ewood Bridge and Newchurch, but this was refused. At the time he delivered up the return ticket the respondent told the company's servant (as the fact was) that he had no other ticket in his possession. The authorized officer of the company thereupon demanded from the respondent the fare from Salford (the place whence the train started) to Newchurch, which the respondent refused to pay.

There was no intention on the part of the respondent to defraud the railway company.

The justices dismissed the information on the ground that the by-law did not apply to the case.

The question for the opinion of the Court was whether, under the above circumstances, the justices' determination was erroneous in point of law.

*Gray, Q.C.* (*Pope* with him), for the appellant. The magistrates were wrong, the respondent violated the by-law by travelling from Ewood Bridge to Newchurch without a ticket, and refusing, being unable to do so, to deliver up a ticket at the end of that journey.

[COCKBURN, C.J. It would be an extremely unreasonable by-law by which the respondent, producing a ticket to Ewood Bridge, should be called upon, because he had not a ticket from Ewood Bridge to Newchurch, to pay the whole fare from Salford.]

The distance from Ewood Bridge to Newchurch must be treated as if it stood alone. The respondent did not produce a ticket, and it is impossible to inquire into motives or intention in such a case.

In the *Queen* v. *Frere*, (1) Lord Campbell, C.J., declared a similar by-law to be an exceedingly reasonable by-law.

*Mellish, Q.C.* (*Holker* with him), for the respondent. The by-law, if taken as a whole, clearly points only at the case of a person having a ticket and wilfully refusing to produce or give it up. But, secondly, if it bears the construction sought to be put upon it by the other side, then it is illegal and void, as being beyond the powers of the railway company to make. The power to make by-laws is conferred by section 109 of the 8 Vict. c. 20, but a railway company can only make such by-laws as are "not repugnant to the provisions" of the statute. Section 103 makes it an offence in a person to travel without having paid his fare, *with intent to evade payment of it;* if the effect of this by-law is to make it an offence to travel without a ticket, *irrespective of the intention to defraud,* then it is repugnant to section 103, which requires a fraudulent intention as the gist of the offence.

*Gray, Q.C.*, in reply.

COCKBURN, C.J. I am of opinion that the decision of the justices was right, and that the penalty could not be inflicted. It is quite clear that the respondent was perfectly innocent of any intention to defraud the company. He intended only to have travelled from a certain station and back, but went on further owing to accidental circumstances; he told the guard this, and that he was ready to pay the difference in the fare. The present proceedings were instituted because he declined to pay for the whole distance from the station from whence the train started. I do not, however, think that the case comes within the terms of the by-law; and, I think, if the by-law were applicable to the case, that it would be contrary to the statute, and consequently illegal and void. The statute (8 Vict. c. 20, s. 103) expressly provides for the case of persons intending to evade the payment of their fares, making that fraudulent intention the gist and essential ingredient of the offence; and then section 109 authorizes the company to make by-laws not repugnant to the provisions of the statute. Therefore, if the company, thus alone authorized to make by-laws, were by a by-law to constitute the same facts an offence, striking

(1) 24 L. J. (M. C.) at p. 71.

1865

DEARDEN v. TOWNSEND.

out the ingredient of intention to defraud, they would be altering an enactment of the statute, and legislating in a sense repugnant to the provisions of the statute. But, on consideration, as I have said, I do not think this is the proper construction of the by-law, which is to be construed, if possible, in a legal sense. The by-law seems to me to relate to the case of a person having a ticket, but failing to conform to the regulations of the company by producing it when required. Probably, if a person were travelling without a ticket, that is, without having obtained a ticket, and not having the intention of getting one, but intending to evade the payment of the fare, the company might be warranted in treating him as if he had a ticket and refused to produce it, for it would not lie in his mouth to say that he was travelling with the intention of defrauding the company. In the present case the defendant was not travelling without a ticket with the intention to evade payment. If he had been, he would have been within the 103rd section of the statute; and he was not within the by-law, which for the reasons I have given, must be interpreted to apply only to the case of a person having a ticket and refusing to produce it. Either, therefore, the by-law did not apply, or it is illegal and void, as constituting an offence different from that created by the statute, by leaving out the ingredient of the fraudulent intention. In either view the magistrates were right in refusing to convict; and the appeal must therefore be dismissed.

MELLOR, J. I am of the same opinion. When we come to examine the by-law, it evidently appears not to be directed against a person travelling without having taken a ticket or paid his fare; for it commences by saying that no person shall be allowed to enter a carriage without a ticket, and requires under a penalty that the passenger shall produce his ticket when required and deliver it up on leaving; that appears to be the effect of the by-law. The statute itself, by section 103, is intended to provide for the case of a person travelling without a ticket with intention of evading payment; and sections 108 and 109 empower a railway company to make by-laws only for certain purposes, such as regulating the travelling on the railway; and this enactment could never have been intended to give power to a company to make a by-law which would be altogether repugnant, as going far beyond the express

enactment of the statute itself, by making it an offence to travel without a ticket irrespective of the intention to defraud. I think, therefore, that this by-law does not apply to the present case; but if it does, as Mr. Gray contends, then I entirely agree with the Lord Chief Justice, that it was beyond the competency of the company to make such a by-law; and therefore the magistrates were right in refusing to convict.

LUSH, J. I am also of opinion that the magistrates were right in holding that the by-law did not apply to the present case. This seems clear if we consider the state of the law. The statute (s. 103) had already provided for the case of a passenger travelling without a ticket, and makes it an offence in a person to attempt to travel in a railway carriage without having paid his fare, and with intent to avoid payment of it, and also to travel beyond the distance paid for, with intent to avoid payment for the additional distance. Then there is a power (s. 109) given to railway companies to make by-laws for the regulation of their traffic not repugnant to the provisions of the statute; and if the present company have made a by-law the effect of which is, that any person travelling beyond the distance paid for, however honest his intention, must pay the fare for the whole distance travelled by the train, or forfeit 40s., then the by-law, being inconsistent with the act, would be void. But in truth, the by-law seems only to be pointed at what is to be done with the ticket with which the passenger is required to provide himself, and at the consequence of not producing and delivering it up as required. Any other construction would make the by-law bad, and therefore the magistrates were right in holding that it did not apply to the present case.

*Appeal dismissed.* (1)

(1) See the preceding case.

1865
*Nov.* 8.

THE QUEEN *on the prosecution of* THE OVERSEERS of BILSTON, RESPONDENTS, *v.* DODD AND ANOTHER, APPELLANTS.

*Poor-rate—Rateable value—Deduction for rates—Landlord compounding.*

Ex 414,422

Under a local act, the owner of a tenement under 6*l.* 10*s.* rateable value, ascertained according to the Parochial Assessment Act, is rated, instead of the occupiers, to the poor and other parochial rates; and, if he chooses, he may compound to pay whether the tenement be occupied or not; and if he so compounds, he is to pay only one-half the rate:—

*Held*, that an owner so compounding is entitled, in ascertaining the rateable value of the tenement, to the full deduction in respect of rates as if the tenement had not been compounded for.

ON appeal to the Staffordshire Quarter Sessions, against a poor-rate for the township of Bilston, the court found that the gross estimated rental of each of the two houses, in respect of which the appellants respectively appealed, was 6*l.* 10*s.*, and their rateable value 4*l.* 13*s.* 7*d.*; and they reduced the rate accordingly, subject, as to a further reduction of the rateable value, to the opinion of the Court on the following case:—

The appellants are the owners of the two houses, each let at 2*s.* 6*d.* a week, giving an annual rental of 6*l.* 10*s.*; and, starting from that value, it is to be taken that the rateable value was correctly obtained by deducting from the gross rental a sum sufficient to cover rates and taxes, and then by deducting from the remainder, 1*l.* 13*s.* 5*d.*, to meet repairs and other deductions allowed by the Parochial Assessment Act. The sum allowed to be deducted in Bilston, for rates and taxes in respect of houses which are not within the act hereinafter mentioned, is one-fifth of the gross rental.

By that act (10 & 11 Vict. c. xxx.), entitled "An act for better assessing the parochial and other rates, on small tenements in the township of Bilston," &c.; it is enacted, "That the owner of every tenement within the townships which may be assessed to the poor-rate and other rates mentioned in the act, at any annual sum under 6*l.* 10*s.*, rateable value, which said annual sum shall be ascertained according to the provisions of the 6 & 7 Wm. 4, c. 96 (the Parochial Assessment Act), shall hereafter be rated and pay such several poor-rates, &c., in respect

of such tenements, instead of the actual occupiers thereof. And in all cases where any owner shall be liable to be rated in pursuance of this act, in respect of any such tenements, it shall be lawful for such owner to give notice to the officer authorized to make or collect the rate, of his intention to compound for the same by payment of a reduced rate whether such tenement be occupied or not, and such owner, until notice to determine such composition, shall be liable to pay one-half of such rate only, and all such compositions shall be entered in the rate book, and such owners shall be thenceforth rated accordingly."

The appellants' houses are thus compounded for, the owners paying for the rates in respect of them only one-half of the sum which would be otherwise payable in respect of them.

The appellants contend that they are nevertheless entitled to the same deduction for rates and taxes as is allowed in respect of other property not compounded for, viz., one-fifth of the gross rental, or 1*l.* 6*s.*

The respondents contend that, inasmuch as houses compounded for only pay one-half rates and taxes, the owners are only entitled to one-half of the reduction, being the sum actually paid by them, and that the proper deduction is therefore one-tenth of the gross rental, viz., 13*s.*

The question for the Court was, whether, the appellants are entitled to the same amount of deduction for rates and taxes as is allowed to the occupiers in respect of property not compounded for. And the rateable value of the houses was to stand, or be reduced by 13*s.*, according as the opinion of the Court was in the negative or affirmative.

*Staveley Hill*, for the respondents, argued that half the usual deduction only ought to be made.

*Keane, Q.C.*, and *McMahon*, for the appellants, were not heard.

COCKBURN, C.J. The Parochial Assessment Act is anterior to the local act, and its enactments are quite irrespective of acts allowing compositions. The Parochial Assessment Act points out what deductions shall be made in respect of the usual

1865

THE QUEEN v. DODD.

tenant's rates and taxes. That is a general enactment, and must apply to the case in which the landlord is put in the place of the tenant; and we must ascertain what are the usual tenant's rates and taxes, independently of the local act. The landlord, therefore, must be considered as standing in the place of the tenant, and he is entitled to the deduction in respect of what the tenant would be rated at, and not what he, the landlord, actually paid; and the rate must be amended accordingly.

BLACKBURN, J. The rateable value is to be ascertained under the Parochial Assessment Act, and the local act then says, if the landlord agrees to pay whether the house is empty or not, he shall only be required to pay half the sum assessed. That does not affect the deductions to be made in order to ascertain the rateable value; a different assessment is not to be made.

MELLOR and SHEE JJ., concurred.

*Rate amended accordingly.*

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*Nov.* 15.

THE QUEEN *on the prosecution of* ISAAC HUGHES, APPELLANT, *v.* THE OVERSEERS OF BILSTON, RESPONDENTS.

*Poor-rate—Assessable Value—Deductions under Parochial Assessment Act (6 & 7 Wm. 4, c. 96), s. 1—Voluntary Water-rate.*

On a case stated by Quarter Sessions, the gross rental of a house was found to be a certain sum:—

*Held*, that in ascertaining the rateable value to the poor-rate, a deduction from this gross rental ought not to be allowed in respect of a payment made by the landlord for water laid on and supplied to the house by public commissioners, such supply and payment being optional.

CASE stated on an appeal to the Staffordshire Quarter Sessions against a poor-rate for the township of Bilston, in which the appellant was rated as the occupier of a house at a gross rental of 11*l.* 5*s.* The Sessions found that the gross rental of the house was 9*l.* 2*s.*, and the rateable value to be 4*l.* 9*s.* 1*d.*, after making certain deductions, including 11*s.* 4*d.* for water-rent, and they reduced the appellant's rating accordingly, subject to the question whether the deduction for water-rent ought to have been allowed.

The township of Bilston is supplied with water partly from pumps and partly from works constructed by a company incorpo-

rated under an act of 4 Wm. 4, c. xlii., and it was entirely in the option of owners or occupiers to accept or refuse the water supplied under that act.

Under the Bilston Improvement Act, 1850 (13 & 14 Vict. c. 96), the Bilston Improvement Commissioners, in the year 1853, purchased from the water-works company all the plant and mains of the company within the township of Bilston, and since that time have supplied water to all persons desirous of accepting it at a regular scale of prices. Under section 76 the commissioners have power to levy a water-works rate for the purpose of purchasing, making, and maintaining water-works, but no such rate has in fact ever been made or levied.

The water is supplied by pipes from the mains to the houses, and when the water-rent is in arrear or unpaid after notice, the supply is cut off and withdrawn. About one-half of the inhabited houses are supplied with water from the water-works, and pay rent for the same to the commissioners, and as to these it is a matter of arrangement between the landlord and tenant to which of the two the water is supplied, and which of the two pays the water-rent. The inhabitants of those houses to which there is no supply from the water-works procure their water from their own wells or other sources. In the present instance the water is supplied from the water-works, the landlord pays the water-rent, and the occupier has nothing to do with it.

The appellants contend that this payment for water is a deduction to which they are entitled under the Parochial Assessment Act, as being an expense necessary to maintain the premises in a state to command the rent.

The respondents contend that, inasmuch as it is optional with the owner and occupier of the house whether they will take their supply of water from the commissioners, or obtain it from other sources, is not a necessary expense or outgoing which they ought to allow as a deduction from the rateable value.

The rate was to stand as reduced, or 11*s.* 4*d.* was to be added to the rateable value, according as the Court was of opinion that the deduction ought or ought not to have been allowed.

*Keane, Q.C.* and *McMahon,* for the appellant, argued that the

1865

THE QUEEN v. BILSTON.

value of the premises would be depreciated if the supply of water were not afforded, and that consequently the payment of the water-rate was a necessary expense to enable the premises to command the rent, within the 6 & 7 Wm. 4, c. 96, s. 1, just as much as the keeping of a pump in repair. The gross value was 9*l.* 2*s.* minus the sum paid for water.

*Staveley Hill*, contrà, was not heard.

COCKBURN, C. J. It is quite clear what the question is, viz., whether this charge for what is called a water-rent should be allowed as a deduction in ascertaining the rateable value of the premises occupied by the appellant. I am of opinion that it ought not to be allowed. It is neither a tenant's rate nor an expense necessary to keep the premises in repair, or to maintain them in a condition to command the rent. It clearly does not come under the first head; and it has no more to do with keeping the premises in a condition to command the rent than a money payment for the supply of gas instead of candles, as put by my Brother Lush in the course of the argument.

MELLOR and SHEE, JJ. concurred.

LUSH, J. The Sessions have found what the gross rental is. We have nothing, therefore, to do but decide the only question left to us, whether, from the sum found as the gross rental, this charge for the supply of water ought to be deducted in ascertaining the rateable value. The Parochial Assessment Act (6 & 7 Wm. 4, c. 96, s. 1) allows certain deductions, but this payment cannot come within any of them. The supply of water has no more to do with enabling the premises to command the rent, than the supply of gas in lieu of candles, and indeed of bread, meat, or any other necessary of life.

*Rate amended accordingly.*

THE QUEEN *on the prosecution of* THE OVERSEERS OF SAINT DIONIS, BACKCHURCH, APPELLANTS, *v.* THE INHABITANTS OF SAINT LEONARD, SHOREDITCH, RESPONDENTS.

1865
*Nov.* 8.

*Poor—Irremoveability—Break of Residence*—9 & 10 *Vict. c.* 66, *s.* 1.

A woman, having resided for sixteen years in the parish of S., was obliged through poverty to sell her furniture and give up her lodgings; and being destitute, she slept for one night on doorsteps in the same parish, and after that, for twenty-one successive nights in a refuge for the houseless poor in an adjoining parish; during the daytime she wandered about, chiefly in the parish of S. She then applied to be admitted into the workhouse of S.; but being refused, she slept for two nights in the parish, and after that was received into the workhouse, and an order for her removal applied for:—

*Held*, that the pauper had not ceased to reside in the parish of S., and was therefore irremoveable.

ON an appeal to the Middlesex Quarter Sessions against an order for the removal of Sarah Brand, widow, from the parish of St. Leonard, Shoreditch, to the parish of St. Dionis, Backchurch, the sessions quashed the order, subject to the following case:—

It was admitted that the pauper's settlement was in the appellant parish.

The ground of appeal was, that the pauper had resided in the respondent parish for three years next before the application for the order of removal, which was on the 25th of February, 1864.

The pauper had resided in various places in the respondent parish of St. Leonard, Shoreditch, for about sixteen years previous, and until the month of September or October, 1863. In the month of September or October, in consequence of illness whilst lodging in the last-mentioned parish, she went into St. Bartholomew's Hospital, in the City of London, but left at her lodging such articles of furniture as she then had, intending to return to it. The pauper remained in the hospital till near Christmas, 1863. The day she left the hospital she returned to her lodging, and then sold her furniture in order to pay the rent which had accumulated and other debts. She then left her lodging, and resided in the respondent parish with the person who bought her furniture, for a week, when, being destitute, she wandered about in the parish and out of it, and slept on the steps of a house in the parish the night before she obtained shelter in a refuge for the

1865

THE QUEEN v. ST. LEONARD, SHOREDITCH.

houseless poor. She slept in the refuge for twenty-one successive nights, her ticket of admission having been renewed at the end of the first seven, and again at the end of fourteen days, such renewal being necessary, according to the rules of the refuge. The refuge is situate out of the respondent parish in the adjoining parish of St. Luke. It is supported by voluntary contributions, and is opened during the winter for the purpose of receiving houseless persons, who are sheltered therein and provided with a sleeping place and a ration of bread. During the period of her being thus sheltered, she in the daytime wandered about, chiefly in the respondent parish, until she met a gentleman who knew her, and he endeavoured to procure her admission into Shoreditch Workhouse, but she was refused admission. She then slept for two nights in the parish, and on again applying was admitted into the workhouse of that parish.

It was contended on behalf of the appellants that upon these facts the pauper was irremoveable, by virtue of having resided in the respondent parish for more than three years next before the application for the order of removal.

It was contended on behalf of the respondents that the residence was broken.

The court of quarter sessions were of opinion that the pauper had no intention of permanently leaving the parish of Shoreditch, but that she was driven to do so in the manner above stated, by being destitute and houseless; and they quashed the order of removal.

The question for the opinion of this Court was, whether, on the above facts, the pauper was irremoveable from the respondent parish by virtue of having resided therein for more than three years next before the application for the order of removal.

*Huddleston, Q.C.*, and *Hastings* appeared for the appellants, in support of the order of sessions; but the Court called upon

*G. Tayler*, for the respondents. In order to be irremoveable under the 9 & 10 Vict. c. 66, s. 1, the pauper must have resided for the five (now three) years next before the application for the order. In the present case, the pauper ceased to reside in fact in the respondent parish for some weeks before the 25th of February,

1864. And, in order to make a constructive residence when the pauper does not actually remain in the parish, there must be a place of residence which the pauper can call her own, and to which she would have a right to return: *The Queen* v. *Stourbridge Union.* (1) The want of such residence was the ground of that decision; and in all the cases in which constructive residence was maintained, there was such a place of residence, either house or lodging.

[BLACKBURN, J. In that case the absence was for three months. SHEE, J. referred to *Hartfield* v. *Rotherfield.* (2)]

COCKBURN, C.J. I am of opinion that the order of sessions was right, and that the pauper was irremoveable. I start with the assumption, that in order to constitute residence within the meaning of the statute, it need not necessarily be in a house. There are unfortunate persons who constantly sleep in such temporary shelter as the dry arches of a bridge afford. If a person were thus to reside three years in a parish, there cannot be the slightest doubt that he would be irremoveable. A man resides where, to use the common expression, he lives. And therefore a person living in the open air without a fixed habitation, being, as to residence, in the same position as one who has a house to live in, if the residence will not be interrupted by any absence for a temporary purpose of business or pleasure in the case of a person who has a house or room to which he can return, I see no reason why the same principle should not apply to a person who has no habitation that he can call his own to return to; so long as it be shewn that he has the intention of returning. It is quite clear on the facts [his Lordship here stated them] that the pauper had no intention of abandoning her residence in the respondent parish. She comes back day by day, and was unsuccessfully trying to get into the workhouse of that parish up to the time that she succeeded, and when the order was made. There was, therefore, in the present case no more interruption in the residence than if a person having a house left it for a day or so intending to come back. Mr. Tayler asserts that, in all cases in which constructive residence has been held to exist, there was a house or lodging to which the

(1) 34 L. J. (M. C.) 179. (2) 17 Q. B. 746; 21 L. J. (M. C.) 65.

1865

THE QUEEN v. ST. LEONARD, SHOREDITCH.

person could return, and he seems to imply that, in order to constitute constructive residence, there must be a house, or room at least, to which the person has a right to return. That seems to me to be begging the whole question. I see no reason, if actual residence may exist without a house, why constructive residence may not also exist without a house. But, in the present instance, I go further. I say the pauper never left the parish; going out of the parish, as she did, for two or three weeks to sleep, she came back every day. Therefore, I go further than the finding of the sessions, that she had no intention of permanently leaving the parish; I think she never really left it.

BLACKBURN, J. In the present case the pauper had resided for sixteen years in the respondent parish, she was then turned out of her lodging, and wandered about the streets of the parish by day, sleeping across the boundary. I entirely agree with the Lord Chief-Justice, that she never ceased to reside in the parish. No doubt, the fact of where a person sleeps is an important element in ascertaining his dwelling-place. Though the pauper was sleeping in the adjoining parish, she was driven thither merely by destitution, and I think, under these circumstances, that the fact of her sleeping for twenty-one nights out of her parish, returning to it by day, did not amount to ceasing to reside there.

MELLOR and SHEE, JJ., concurred.

*Order of Sessions affirmed.*

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*Nov* 8.

THE LOCAL BOARD OF HEALTH OF CHATHAM EXTRA, } APPELLANTS.
THE ROCHESTER PAVEMENT AND ROAD COMMISSIONERS, } RESPONDENTS.

*Highway—Turnpike-road—Application of Tolls*—12 & 13 *Vict.* c. 87, *s.* 3.

Section 3 of 12 & 13 Vict. c. 87,—which enacts that where the trustees of any turnpike-road shall *hereafter* borrow, charge, or secure any sum of money on the credit of the tolls arising on such road, they shall out of the tolls, in priority of all payments except the interest, set apart 5*l.* per cent. per annum on the sum borrowed, as a sinking fund towards repaying it,—does not apply to a case in which the trustees had borrowed a sum at 5*l.* per cent. for the purposes of their roads before the passing of the act, and after the act passed, borrowed money at 4*l.* per cent., in order to pay off the original debt.

*Semble*, by *Cockburn*, C.J., and *Mellor* and *Shee*, JJ. (*Blackburn*, J., inclining to a

contrary opinion), that the statute has no application to a case in which the object of the special act, creating the trust, is that of paving and lighting a town, as well as of forming turnpike-roads, the rates levied and tolls collected being treated as one fund, and the money borrowed on the security of the rates as well as of the tolls.

CASE stated under 20 & 21 Vict. c. 43, by justices at special sessions for the highways for the Rochester Division of the Lath of Aylesford, in the county of Kent.

The respondents are the commissioners of the turnpike trust under the 9 Geo. 3, c. 32. "An Act for paving, cleansing, lighting, and watching the high streets and lanes in the parish of St. Nicholas, within the city of Rochester, and parish of Strood, in the county of Kent; and for making a road through the lane, across certain fields adjoining thereto, to Chatham Hill in the said county;" and an information was preferred on their behalf under the 4 & 5 Vict. 59 (continued by 23 & 24 Vict. c. 67), alleging that the funds of the turnpike trust are insufficient for the repair of the road lying within the district called Chatham Centre, in the parish of Chatham, and praying the justices for an order that so much of the rates levied and applicable to the repair of the highways within the said parish and district as the justices should judge necessary should be paid by the Local Board of Health of Chatham Extra, being the surveyors of highways of the said parish and district, to the respondents, towards the repairs of that part of the said road as is within the parish and district.

The justices made an order, as prayed, for the payment of 100*l*.

The commissioners appointed, and to be appointed, under the 9 Geo. 3, c. 32., which is declared to be a public act, were empowered and directed from time to time to cause the streets and lanes in the parishes of St. Nicholas, Rochester and Strood, to be paved, cleansed, lighted, and watched as they should think fit; also to open, make, and keep in repair a road through and from Star Lane, in the city of Rochester, across the fields and grounds leading to Chatham Hill, to a road then existing on Chatham Hill, being the old road from London through Rochester and Chatham to Dover.

The act empowered the commissioners to make every year one

1865

CHATHAM LOCAL BOARD v. ROCHESTER PAVEMENT COMMISSIONERS.

rate or assessment of and upon all and every person and persons who inhabit, hold, or occupy any houses or tenements whatsoever, within the said parishes of St. Nicholas and Strood respectively, so as such rate or assessment in respect of the tenements within the said parishes of St. Nicholas and Strood, shall not exceed in the whole the sum of 1*s.* in the pound, according to the rate made for the relief of the poor of the parish of St. Nicholas, nor more than 9*d.* in the pound on houses and buildings in the parish of Strood, according to the rate made for the relief of the poor there, and to erect one turnpike gate at the end of the new road next Chatham Hill, and another gate at or near the Angel Inn, in Strood, and no other gate upon any of the said streets or roads, and to take at such gates the tolls specified by the act.

The commissioners are also empowered at any meeting to borrow and take up at interest any sum or sums of money upon the credit of the rates, assessments, and tolls payable by virtue of the act, and to assign over the same or any other part or parts thereof, by any writing or writings under their hands and seals, to any person or persons that shall advance or lend their moneys thereon as a security or securities for the several sums that shall be borrowed and the interest thereof, with power to the assignees to transfer their securities. And it is enacted that all moneys raised or collected by virtue of the act shall be vested in the commissioners, and shall be applied for the purpose of the act, and to no other purpose; without declaring that any one of such purposes shall have priority or preference over another or others of such purposes.

The new road was made and maintained to the present time by the commissioners, and the turnpike gates set up and maintained as directed by the act, and tolls continue to be taken thereat, and rates are annually made and collected in the parishes of St. Nicholas and Strood at the maximum rate of 1*s.* in the pound in the former, and 9*d.* in the latter parish; and the streets and lanes of the two parishes are kept paved, lighted, and cleansed, pursuant to the act. The whole of such income is treated as a common fund, and has been applied to all the payments to which the trust is liable.

The commissioners from time to time borrowed money for the

purposes of the said act amounting to upwards of 10,000*l.*, which has been reduced by occasional payments of principal to its present amount of 8000*l.* The great bulk of this loan was borrowed in 1769 and 1770 (except 200*l.* borrowed in 1823), at 5*l.* per cent. per annum. Interest and sums were paid off from time to time, so that in 1853 the principal secured by the assignment of tolls, &c., was 9800*l.*; and the commissioners believing that the money could be had at a lower rate, advertised for a loan of that amount at 4*l.* per cent., interest to be secured on the tolls and rates of the trust. Among the holders of the original assignment of 1770, creditors to the amount of 2200*l.* offered to continue, at the reduced rate of interest, and new capitalists came forward, whose tenders were accepted for 7500*l.* more, making together 9700*l.* The remaining 100*l.* was paid off absolutely from funds in hand.

All the original assignments were, in April, 1853, delivered up and cancelled, as well those of creditors who lowered the rate of their interest and continued otherwise creditors as before, as those of the creditors who received their principal money and relinquished all claim; and new assignments to the amount of 9700*l.* were executed to all the creditors, whether new or continuing, without distinction. Since 1853 assignments to the amount of 1700*l.* have been paid off, without any preference, reducing the total secured debt to the present sum of 8000*l.*, at interest at 4*l.* per cent.; and 6800*l.* of this present debt is due to creditors who had no claim on the trust until April, 1853; the remainder, 1200*l.*, is due to those who then exchanged old assignments for new ones.

The assignments are all in the same form, viz., an indenture, by which, after reciting the powers of the act, the commissioners assign the rates, assessments, and tolls payable by virtue of the act to the lender, until the sum borrowed, with interest, is satisfied.

The case then set out the proportion of the roads in the two parishes, and the estimated revenue, from which it appeared that, after allowing 400*l.* as a sinking fund, at 5*l.* per cent. on 8000*l.*, there was a deficit in the funds for the repair of the roads in the appellant district of 376*l.*

The appellants contended that the respondents cannot lawfully set aside 5*l.* per cent. on the 8000*l.* until after payment of the

1865

CHATHAM LOCAL BOARD v. ROCHESTER PAVEMENT COMMISSIONERS.

necessary expenses of the repairs of the road; inasmuch as the debt, if any, being an old debt created before the passing of the 12 & 13 Vict. c. 87 (1st of August, 1849), the powers of that act were not available, and the respondents are left to apply only those of the 13 & 14 Vict., c. 79; and that there would then be no deficit in the funds towards the repair of the road, but about 25*l.* over. The appellants also contended that, unless the 8000*l.* is an old debt created before 1849, the existing assignments of rates and tolls are void as being for money raised for other purposes than those of the 9 Geo. 3, c. 32.

The respondents contended that they were authorized under the 12 & 13 Vict. c. 87, and 13 & 14 Vict. c. 79, (1) to set apart 5*l.* per cent. after payment of the interest only; and that if after that their revenues were not sufficient for the repairs of the road, the parishes through which it passed were bound to contribute from their highway rates. And they also contended that the present debt was both in form and substance a new debt, created since 1849.

The justices made the above order, being of opinion that, after the payment of interest, and setting apart 400*l.* for a sinking fund, under the 12 & 13 Vict. c. 87, the revenues of the trust would be insufficient for the repairs of the road, and that the parishes were bound to contribute under the 4 & 5 Vict. c. 59.

The question for the Court was, whether the deficiency arose lawfully under the 12 & 13 Vict. c. 87, so that the order for contribution would be lawfully made; or whether the respondents were bound to provide for the repair of the road prior to setting aside 5*l.* per cent. as a sinking fund. (1)

(1) The 12 & 13 Vict. c. 87 (1 August, 1849), s. 3, enacts, "In every case in which the trustees or commissioners of any turnpike-road shall *hereafter* borrow, charge, or secure any sum of money on the credit of the tolls arising on such road, they shall, out of the rates of such road, and in priority of all other payments thereout, except the interest on the money borrowed, or any other moneys remaining owing on the security of the tolls, set apart a sum of 5*l.* per cent. per annum on the amount of the money borrowed, charged, or secured; and so often as the sums set apart shall amount to 200*l.*, the trustees shall apply it in payment of a proportionate part of the money borrowed and remaining unpaid to the creditors on the tolls," in the manner pointed out.

Section 4 of 13 & 14 Vict. c. 79, recites the above enactment, and enacts that when money has been borrowed

1865

CHATHAM LOCAL BOARD v. ROCHESTER PAVEMENT COMMISSIONERS.

*Mellish, Q.C.* (*F. Smith* with him), for the respondents, in support of the order. The first question is whether the respondents, the commissioners, were entitled to take credit for the 5*l.* per cent. for the sinking fund before providing for the repairs of the road; this depends on whether, on the facts, the money was borrowed before or after the 1st of August, 1849; if before that date, the case is within the 13 & 14 Vict. c. 79, s. 4, and the repairs take precedence; but if after, then by the 12 & 13 Vict. c. 87, s. 3, the commissioners were bound to lay by 5*l.* per cent. on the sum borrowed, in priority to all payments, except interest; and after doing this, the funds were not sufficient for the repair of the road, and the order was right. This was not an assignment of an old debt; the old securities were surrendered, and new ones given, in most cases to a new creditor.

*Bovill, Q.C.* (*Prentice* with him), for the appellants. This was a sum really borrowed before the 12 & 13 Vict. c. 87, and therefore not within section 3 of that act, but within section 4 of the 13 & 14 Vict. c. 79. The first borrowing created no debt, but was simply an assignment of the tolls: *Pardoe* v. *Price.* (1) If any other construction were put on this transaction, it would be in the power of the commissioners to create a fresh charge, and make a new debt out of an old one, and so transfer the burden of repairing the roads to the parish. Secondly, assuming the money to be borrowed in 1853, then the borrowing was not authorized by the special Act, 9 Geo. 3, c. 32. There is no power to borrow, except for the purposes of the act; no power is given to borrow to pay off old debts: the two purposes are very different. Thus the master of a ship has power to pledge his owner's credit for necessaries, but he has no power to borrow to pay a debt already contracted for necessaries. So a husband is liable for necessaries supplied to his wife, but not for money borrowed by her to pay for necessaries. Lastly, the present case is not within the 12 & 13 Vict. c. 87, s. 3, at all. That section contemplates the case of money borrowed on the credit of tolls *simpliciter;* but here the object of the special act is far beyond that of the creation of a

*before* the passing of the above act, a sinking fund of 5*l.* per cent. shall be set aside after payment of interest, &c., and *after providing for the repairs of the road.*

(1) 11 M. & W. 427.

1865

CHATHAM LOCAL BOARD v. ROCHESTER PAVEMENT COMMISSIONERS.

mere turnpike trust, and the money is borrowed on the credit of the rates leviable under the act, as well as of the turnpike tolls, and the whole revenue from both sources is treated as but one fund. *The Trustees of Sunk Island Turnpike Road* v. *Patrington* (1) will be cited on this point by the other side; but that case goes no further than this, that in a case where tolls are taken on the road, and also for the use of piers, the case may be within the act. The trust and special act in that case were very different from the present.

*Mellish*, in reply. The paying off of an old debt was a purpose of the act. *The Trustees of Sunk Island Turnpike Road* v. *Patrington* (1) is directly in point in the respondents' favour, that such a trust as the present is within the general act.

COCKBURN, C.J. I am of opinion that the appellants are right, and that this order must be quashed. The first question is, whether the act of 1849 (12 & 13 Vict. c. 87) applies to the present case; if it does, it was the duty of the commissioners, out of the fund collected under their special act, to lay aside 5*l.* per cent. for a sinking fund, after paying the interest on the loan, before proceeding to defray the expenses incident to the repairs of the road. I think the act does not apply. In this case a trust was created by the statute of Geo. 3, and the commissioners were empowered to borrow money on the credit of the rates and tolls levied and taken under the act. They borrowed money at 5*l.* per cent.; they were afterwards advised that they could obtain a loan on more advantageous terms, viz., at 4*l.* per cent.; they accordingly advertised for persons willing to advance money at 4*l.* per cent. on the security of the rates and tolls; and they ultimately obtained the amount at 4*l.* per cent., and so in effect paid off the original loan at 5*l.* per cent. This they did after the passing of the 12 & 13 Vict. c. 87, and the question is whether the act applies to this second borrowing. Section 3 enacts, "that in every case in which the trustees or commissioners of any turnpike road shall hereafter borrow, charge, or secure any sum or sums of money on the credit of the tolls arising on such road, such trustees or commissioners shall, out of the tolls of such road,

(1) 1 B. & S. 747; 31 L. J. (M.C.) 18.

and in priority to all other payments thereout, except the interest on such moneys as aforesaid, and on any other moneys remaining owing on the security of the said tolls, set apart a sum of 5*l.* per cent. per ann. on the amount of money so borrowed, charged, or secured," as a sinking fund. It is very true, if we take the words in their literal signification, they would apply to the present case; a sum *was* borrowed after the passing of the act; but, notwithstanding, I do not think it is within the meaning of the act, inasmuch as it was borrowed, not for a fresh purpose, such as making a road or other improvements within the scope of the statute, but only for the purpose of paying off the previously existing debt. It in effect was merely a substitution of a new for an old debt. The legislature never could have contemplated such a case. As I pointed out in the course of the argument, the fund might be adequate to pay the interest, and for the repairs, but might not be sufficient also to constitute a sinking fund. The act was not intended to provide for such measures, but for the event of money being borrowed after the passing of the act, to carry out the purposes of the trust. No doubt the state of things has been greatly changed of late years owing to railways, and turnpike tolls do not afford the security they did; but I cannot think that this section was intended to apply to a case where money had already been borrowed. Here there is no new charge, but simply a new security substituted for the old, for the obvious advantage, no doubt, of all parties concerned. Therefore it appears to me that the commissioners were not bound to set aside 400*l.* towards a sinking fund; and if they were not bound so to appropriate this sum, it is admitted on all hands that there are sufficient funds for the repairs, after payment of the interest, without calling on the appellants to contribute.

This ground is sufficient to decide the case; but I own I cannot see my way to the conclusion that the act applies at all to the present case. Section 3 speaks of borrowing on the credit of the tolls, and the trustees are to lay by 5*l.* per cent. out of the tolls as a sinking fund, to pay off the money so borrowed, and I cannot see how that can apply to a sum borrowed on the security of rates as well as tolls; the two funds are entirely distinct in their nature, tolls being precarious, but the rates certain and permanent, and

1865

CHATHAM LOCAL BOARD v. ROCHESTER PAVEMENT COMMISSIONERS.

the creditor, having the security of the latter, is in a very different position. But however that may be, inasmuch as in the present case there is no distinction made by the special act between the two funds, and the money is borrowed on an assignment of the rates as well as tolls, I cannot think that the statute, which applies in terms to tolls simply, could be intended to embrace this case. Therefore, on the whole, I entertain a strong opinion on the second point also against Mr. Mellish, that the act cannot apply. The order is wrong, and must be quashed.

BLACKBURN, J. I agree entirely with my Lord on the first point, viz., that, assuming the present case to be the same as if there were nothing but tolls, the debts are not debts within the meaning of the act of 1849, but would be debts within that of 1850, and, therefore, that a sinking fund would not have priority over the repairs of the road, and, consequently, that the order ought not to have been made; and upon that point, and that point only, I think that the order ought to be quashed. The act of 1849 (12 & 13 Vict. c. 87, s. 3) enacts that wherever the trustees of any turnpike road shall *hereafter* borrow, charge, or secure any sum of money on the credit of the tolls, they shall set apart a sinking fund out of the tolls before they make any other payments except the interest. The act of 1850 (13 & 14 Vict. c. 79, s. 4) extends this to money borrowed before the act of 1849, but only so far as to give the sinking fund priority *after* the repairs of the roads have been provided for. The difference in the two statutes can only be of practical importance when the trust is in a state bordering on insolvency, and it is with such cases that the Legislature was dealing; and we must look at the state of the law at the time the statutes passed, in order to ascertain what was meant. Turnpike roads are all highways, and in the first place the trustees were bound to repair them out of the tolls, if sufficient, and if they are not sufficient, then the parish was bound to repair them as highways; and the consequence is that the effect of causing a sinking fund to be set apart out of the tolls before the expense of repairing the roads is paid, is to accelerate the liability of the parishes. And the question comes really to this, is the sinking fund to be delayed, or promoted at the expense of the parish? Now it would be very right and proper for the legislature to say,

whenever any money is borrowed for a fresh purpose for the benefit of the parish, that the parish shall in effect give a first security for the sinking fund; but where a debt has already been incurred without the parish being liable, it would not be right to make the parish give security for the sinking fund towards the payment of debts, which had been contracted without such security; and it becomes material to consider whether the money was borrowed before or after the act. The question, therefore, is, what is the meaning of hereafter borrowing and charging a sum of money? I think those words can only apply where there is a new charge; and when money has already been borrowed and charged on the tolls, I do not think that a transfer of the security to fresh creditors, for the purpose of diminishing the rate of interest, can be considered a fresh charge; it is merely continuing an old charge, although it may be to a new creditor; and such a case does not come, in my opinion, within the act of 1849, although it would be within the act of 1850. In the present case, though in form the old creditors were paid off and a new assignment made of the tolls, the purpose being to reduce the rate of interest, yet in substance it is quite plain it was but a continuance of the old debt, all parties agreeing in the reduction of the rate of interest.

As to the point much pressed in the course of the argument, that a borrowing for the purpose of paying off an old debt was not within the powers of the commissioners, I cannot think, when power is given to borrow money from time to time, and money having been borrowed at a higher rate of interest, a fresh loan is effected in order to reduce the rate of interest, that a borrowing for such a purpose, if fairly done towards all parties, is *ultra vires*. It is, in effect, merely a continuation of the old debt.

On the last point to which my Lord adverted, were it necessary to express a decided opinion, I should wish for further time for consideration. The inclination of my opinion, as at present advised, is, that the case is not the less within the meaning of the statute, although the borrowing is not simply on the security of the tolls but of the rates also.

MELLOR, J. I agree with the Lord Chief Justice, and my Brother Blackburn on the first point. Admitting the literal construction of the words of the statute to be as Mr. Mellish con-

1865

CHATHAM LOCAL BOARD v. ROCHESTER PAVEMENT COMMISSIONERS.

tends; yet when one comes to consider the subject matter of the two statutes, I think we can arrive at a reasonable and satisfactory construction. Though it may be reasonable, as to money borrowed on the security of turnpike tolls before the statute of 1849, that, owing to change in circumstances, a sinking fund should be provided; yet as that would have an effect on the interests of the parish at large, it ought not to have priority to money borrowed after; because the original money was borrowed on the credit of things as they then stood, and there is no necessity to hold out special inducements to obtain the money. This borrowing was for the purpose of paying off the old debt, contracted when the commissioners were not authorized to increase the charge or incumbrance on the tolls, except on the terms of the act of 1849, as this was not an increase of the obligation, but simply a continuance of the old incumbrance, I can see no reason why the construction that Mr. Mellish contends for should prevail. Without saying more on this point, I entirely concur with the conclusion arrived at by my Lord and my Brother Blackburn.

With regard to the second point, I confess I agree with my Lord, and I cannot help thinking that the present case does not fall at all within the statute. The object of the special act was chiefly the paving, and lighting, and improving the town, and incidentally making a new road as an approach, and for that purpose rates were to be levied on certain parishes and tolls taken at particular gates, and the proceeds become one common fund applicable to the various purposes of the act, not only to the repair of the road, but the lighting, and other things which are the principal objects contemplated by the act; the road itself being comparatively subordinate. That being the nature of the trust, when we come to look at the 12 & 13 Vict. c. 87, we find that whenever the trustees of a turnpike road shall borrow money on the credit of the tolls on such road, they are to give security out of the tolls, and the money is to be paid to the creditors on the tolls. Now, the creditors in the present instance are not creditors on the tolls of the road alone; but the act of Geo. 3, under which the road was formed, authorizes the commissioners "to borrow and take up at interest, any sum of money upon the credit of the rates, assessments, and tolls." And it appears to me that the setting apart

1865

CHATHAM LOCAL BOARD *v.* ROCHESTER PAVEMENT COMMISSIONERS.

the sinking fund would be attended with great hardship, and alter materially the position of the parish: and that the statute was not intended to apply to a case in which the security mainly, or to a considerable extent, depends on a right to charge and assess lands and tenements, which are of a permanent character and not precarious, like turnpike tolls. I found my judgment, like my Lord and my Brother Blackburn, on the first point; but I thought it right to express my views on the second point also.

SHEE, J. I agree that the 12 & 13 Vict. c. 87, has reference only to a new charge made after the passing of the act, or to further charges on the tolls made after the passing of the act; and I also entirely agree with what has fallen from my Lord and my Brother Mellor on the second point.

*Order quashed.*

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MARSHALL *v.* THE EMPEROR LIFE ASSURANCE SOCIETY.

*Nov.* 13.

*Practice—Particulars of plea.*

To a declaration on a policy of life insurance the defendant pleaded, that the proposal, the basis of the policy, declared the life insured had not had any symptoms of certain enumerated diseases, or any other complaint, whereas he had had symptoms of disease of the stomach:—The Court ordered particulars to be delivered of the symptoms of the disease alleged.

DECLARATION on a policy of insurance effected by the plaintiff on the life of one John Mason.

4th plea. That the proposal and declaration, the basis of the policy, declared that the life assured had not been afflicted with, or had any symptoms of gout, rupture, insanity, liver complaint, hæmorrhoids, fistula, consumption, asthma, spitting of blood, or any other complaint, whereas he had had symptoms of disease of the stomach.

On application at chambers, Shee, J., had made an order that the defendant should deliver to the plaintiff, *inter alia*, particulars of the symptoms of the disease of the stomach, which the 4th plea alleges J. M. had had.

*Raymond* moved to set aside this order, contending that it was

1865

MARSHALL v. EMPEROR ASSURANCE SOCIETY.

impossible to comply with it; if the defendant complied by enumerating certain symptoms, he might be prevented from amending at the trial or from giving material evidence as to other symptoms. In *Pylie* v. *Stephen*, (1) to a declaration for a breach of warranty of a horse, containing a general allegation that the horse was unsound, the court refused to allow particulars of unsoundness.

[SHEE, J. How is the plaintiff to meet such a general plea as this without particulars? COCKBURN, C.J. The defendant must give the best particulars he can; the judge will not tie him down very strictly at the trial, if he has honestly done his best to furnish particulars.]

*Per curiam.*—COCKBURN, C.J., and MELLOR, SHEE, and LUSH, JJ.

*Rule refused.*

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*Nov.* 25.

## THE QUEEN *v.* THE JUSTICES OF HUNTINGDONSHIRE.

*Inclosure Act*, 1845 (8 & 9 *Vict. c.* 118) *ss.* 62, 63, & 64—*Notice of Appeal against shutting up a road.*

A valuer appointed under the Inclosure Act, 8 & 9 Vict. c. 118, s. 62, having given notice of intention to stop up a road from A to B, a notice of appeal, under s. 63, against the stopping up of a part of the road, is good; and the Quarter Sessions are bound to hear the appeal.

*Quære*, whether the legal effect of the appeal, if successful, would be to leave the whole road open.

RULE, obtained on behalf of F. Johnson, clerk, calling upon the Justices of Huntingdonshire to shew cause why a writ of mandamus should not issue, commanding them to enter continuances, and hear his appeal against the stopping up of a highway under the Inclosure Act, 1845, 8 & 9 Vict. c. 118.

It appeared from the affidavit upon which the rule was obtained that George Smith was appointed under the Inclosure Act, 1845, 8 & 9 Vict. c. 118, to act as valuer in the matter of the inclosure of the waste and commonable lands situate in the parish of Great Gidding, in the county of Huntingdon. On the 4th of July, 1865, Smith duly advertised and affixed, under section 62, a notice

(1) 6 M. & W. 813.

which included certain roads to be diverted or altered, and others which were to be discontinued and stopped up, from and after the 4th of December then next; among the latter, "the road from the Oundle Road to Lutton Corner at the side of the Luddington Mere Hedge, or near thereto."

On the 29th of September following, the Rev. F. Johnson, the appellant, sent a notice, under s. 63, with grounds of appeal to Smith. The notice, after reciting that, on the 4th of July, 1865, Smith had given notice that the road from the Oundle Road to Lutton Corner at the side of the Luddington Mere Hedge, or near thereto, is intended to be discontinued and stopped up, proceeded, "I hereby give you notice that I intend to appeal against the discontinuance and stopping up of so much of the said road as lies between a certain house occupied by one William Fletcher and the said point called Lutton Corner."

Upon the appeal coming on to be tried, under s. 64, the quarter sessions refused to hear it, on the ground that the appellant had no right to appeal against the discontinuance and stopping up of a part only of one of the roads mentioned in the valuer's notice.

*Metcalfe* and *D. Brown* shewed cause. (1) The justices were right in refusing to hear the appeal. If the appellant was aggrieved by the shutting up of a part of any one of the roads mentioned in the notice advertised by the valuer, he should have appealed against the shutting up of the whole road; he cannot appeal against a part only. By the 8 & 9 Vict. c. 118, ss. 63 & 64, the appeal is to be against the shutting up "such road," meaning the road as defined by the valuer.

*Markby*, in support of the rule, was not called upon.

BLACKBURN, J. I think the rule should be made absolute. If a valuer, appointed under the 8 & 9 Vict. c. 118, gives notice that he is going to shut up a road from A to C, and a person wishes to keep open a part of that road from A to B, and considers that he would be aggrieved by the shutting up of that part, it is sufficient for him to give notice of appeal against the shutting up of that part. It is enough now to say that upon such a notice he has a right

(1) Before Blackburn, J., sitting in the Bail Court.

1865

THE QUEEN v. JUSTICES OF HUNTINGDONSHIRE.

to have his appeal heard. It is quite another question what the effect of such an appeal would be; probably, if the road were an entire road, not divisible, an appeal against a part would, in fact, be an appeal against the whole; so that, if the jury should be of opinion that the part of the road the subject of the appeal ought to be kept open, the whole road must be left open. If the appellant should succeed, a question of some difficulty may hereafter arise upon the effect of the appeal; it would, therefore, be better that the chairman of quarter sessions should leave to the jury the questions as to the part, and as to the whole, separately, reserving the legal effect for the consideration of the Court.

*Rule absolute.*

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*Nov.* 20.

THE GUARDIANS OF THE HASTINGS UNION, APPELLANTS, THE GUARDIANS OF SAINT JAMES, CLERKENWELL, RESPONDENTS.

*Poor—Settlement by renting a tenement under* 6 *Geo.* 4, *c.* 57—*Lease, construction of.*

H. occupied a house for six years under the following agreement: W. agrees to let, and H. agrees to hire the house, No. 62, George Street, quarterly, at a yearly rent of 25*l.* to be paid on the usual four quarter-days, a quarter's notice to be given by either party:—

*Held*, that it was at the option of either party to have determined the tenancy before the end of the first year; but that, on the authority of previous cases, inasmuch as the tenancy amounted to a tenancy for a year defeasible by notice, and had, in fact, endured more than a year, H. had gained a settlement by renting a tenement for a whole year within the meaning of the 6 Geo. 4, c. 57.

CASE stated under 12 & 13 Vict. c. 45, s. 11, on an appeal against an order of justices, adjudicating the settlement of John Hazel, a pauper lunatic in the Middlesex Asylum, to be in the parish of St. Clement, in the Hastings Union, and ordering the guardians of that union to pay to the guardians of the parish of St. James, Clerkenwell, certain sums for the pauper's maintenance, &c.

The particulars of settlement relied on were the hiring or renting of a tenement by the pauper in the parish of St. Clement, at the yearly rent of 10*l.*, under the 6 Geo. 4, c. 57.

The grounds of appeal put in issue the sufficiency of the hiring for the purpose of conferring a settlement.

The facts as to the hiring, were as follows:—

John Hazel, in July, 1856, applied to George Wellerd, as the agent of William Wellerd, to become the tenant of the house No. 62, George Street, in the parish of St. Clement, Hastings, and an agreement was then signed, which was as follows:—

"An agreement between William Wellerd and John Hazel.

"William Wellerd agrees to let, and John Hazel agrees to hire, the house No. 62, George Street, quarterly, at a yearly rent of 25*l.*, to be paid on the 29th of September, 25th of December, 25th of March, and 24th of June. Taxes to be paid by tenant; to be left in tenantable repair. A quarter's notice to be given by either party."

The rent for the house was always paid quarterly.

It was admitted by the appellants that John Hazel occupied the house under the agreement for six years, and resided therein, and was assessed to and paid rates and taxes in respect thereof, so as to gain a settlement in the parish of St. Clement, if the agreement constituted a yearly hiring or renting of the house for the term of one whole year, within the meaning of the 6 Geo. 4, c. 57, s. 2.

*Poland* (Nov. 8) for the respondents. The question is, whether the pauper had acquired a settlement in the appellant parish by renting a tenement for one whole year within the meaning of the 6 Geo. 4, c. 57, s. 2. The question is already decided by several cases, the last of which is *The Queen* v. *Saint Giles, Cripplegate;* (1) if the hiring is such as in its inception will last a year unless determined by notice, and the tenancy does in fact continue for a year, that is sufficient, although the hiring was not for a whole year certain.—The Court then called upon

*Hurst,* for the appellants. In that case and the other cases, which might have been cited, the hiring was for an indefinite period, which no doubt is a hiring for a year. But the present is a letting from quarter to quarter, and it never became a tenancy from year to year; for it was determinable by a quarter's notice at any time of the year; "yearly" is only a word of calculation: *Doe* v. *Grafton.* (2)

[BLACKBURN, J. That was the argument used in *The King* v.

(1) 4 B. & S. 509; 33 L. J. (M. C.) 3. (2) 18 Q. B. 496; 21 L. J. (Q. B.) 276.

1865

HASTINGS UNION v. ST. JAMES, CLERKENWELL.

*Herstmonceaux;* (1) but the court held that it was a yearly tenancy, and that the tenant when in was in of the whole estate of a year.]

There never was a time in which the pauper was in for a year; he never had an indefeasible estate for a year.

[BLACKBURN, J.—*The King* v. *Herstmonceaux* (1) and other cases on the statute have decided that that is not necessary.]

There is here no ground for inferring the creation of a tenancy from year to year: *Wilson* v. *Abbott* (2). The cases on hiring and service, *The King* v. *Warminster* (3), *The King* v. *Dodderhill* (4), are in point to show that this is not a renting for a whole year within the statute.

*Poland*, being called upon to continue his argument, cited *Willesden* v. *Paddington* (5), as undistinguishable from the present case.

*Cur. adv. vult.*

Nov. 20. The judgment of the Court (COCKBURN, C.J., and BLACKBURN, MELLOR, and SHEE, JJ.) was delivered by

SHEE, J. In this case, the question is whether John Hazel, a pauper, had acquired a settlement in Saint Clement's, Hastings, by renting a tenement for the term of one whole year, within the meaning of the statute 6 Geo. 4, c. 57.

The pauper actually occupied the premises for six years, under an agreement in the following terms: "William Welland agrees to let and John Hazel agrees to hire the house No. 62, George Street, *quarterly*, at a yearly rent of 25*l.* to be paid on 29th of September, 25th of December, 25th of March, and 24th of June. Taxes to be paid by tenant; to be left in tenantable repair; a quarter's notice to be given by either party."

The language of the agreement, speaking as it does of a yearly rent, and mentioning the four quarter-days, shews that the parties contemplated that the tenancy would probably continue for a year; but it was in the power of either party to put an end to the tenancy by a quarter's notice, and we think that the use of the word "quarterly" shews that it was intended that the notice

(1) 7 B. & C. 551. (2) 3 B. & C. 88. (3) 6 B. & C. 77.
(4) 3 M. & S. 243. (5) 3 B. & S. 593; 32 L. J. (M. C.) 109.

might terminate at the end of *any* quarter; so that it was at the option of either party, by giving a proper notice, to terminate the tenancy before the end of the year.

If we were now, for the first time construing the statute 6 Geo. 4, c. 57, we should not be disposed to hold, that this was a hiring for a whole year; as there is great force in the argument that the true construction of the statute is, that the tenancy must be such as must endure for a whole year; but in *The King* v. *Herstmonceaux*, (1) though it was forcibly contended in the argument that such was the true construction, the court, consisting of three most eminent judges, Bayley, Holroyd, and Littledale, JJ., decided, after taking time to consider, that, "a taking at 20 guineas a year, the rent to be paid weekly, and either party to be at liberty to give three months' notice from any quarter-day, and, at the expiration thereof to determine the tenancy," was a taking for a year, unless within the year notice should be given; and that, notice not having been given, the occupation was under a letting for a whole year within the meaning of statute 6 Geo. 4, c. 57. This case was followed by this court in *The Overseers of Willesden* v. *The Overseers of Paddington*. (2) In that case there was an obscurely-worded agreement. Wightman, J., in his judgment, states its effect to be "a demise for three months certain from the 25th of December, 1859; but that if the parties should go on as landlord and tenant after that time it should be a yearly tenancy at the rate of 18*l*. a year payable monthly, and determinable by giving three months' notice;" "which" Wightman, J., thought "might be given at any time, and need not be a notice expiring at any particular time." "Then," said the learned judge, "the pauper having occupied for more than a year has rented a tenement for the term of one whole year within the meaning of the statute 6 Geo. 4. c. 57." Crompton, J., seems to have inclined to think that the construction of the agreement was, that the notice to quit must expire at the end of the year (on which reading of the agreement the present question would not arise); but he expresses no dissent from the view of Wightman, J., and no disapprobation of *The King* v. *Herstmonceaux*. (1) In *The Queen* v. *St. Giles, Cripplegate*, (2) the case of *The King* v. *Herstmonceaux* (1) was again followed.

(1) 7 B. & C. 551. (2) 4 B. & S. 509; 33 L.J. (M.C.) 3.

1865

HASTINGS UNION v. ST. JAMES, CLERKENWELL.

There, the letting was of a house, "from 25th of March, 1858, at the monthly rent of 1*l.* 11*s.* 8*d.* . . . one month's notice, to expire either on the 25th of March, 25th of June, 25th of September, or 25th of December, shall be a good and sufficient notice on either side," for the tenant to deliver up possession. Though the rent was expressed to be monthly, it was clear from the agreement as to the notice to quit, that the tenancy was intended to be more than a monthly one. The court say, "to what other conclusion can we come than that it was a hiring of the tenement indefinite as to duration, but terminable at a month's notice on either side on any of the specified quarterly days? and the house having been actually occupied under that hiring for upwards of two years, it appears to us to have been an occupation under a hiring for a whole year."

No case was cited, nor are we aware of any, in which the authority of *The King* v. *Herstmonceaux* (1) has been questioned; and on this state of the authorities we feel ourselves bound to hold that, though a tenancy is terminable by a notice to quit within a year, yet, if the terms of the hiring are such as to show that the parties contemplated that the tenancy would, unless the notice was given, endure for a year or more, and if it does endure for a year, it will be sufficient to confer a settlement.

We do not intend to decide, that a weekly tenant at a weekly rent, who by payment of rent becomes a tenant from week to week, so long as both landlord and tenant please, gains a settlement at the end of 52 weeks, as having held under a letting for a whole year. We think that the decisions only apply to cases where it appears from the terms of the letting, that the parties contemplated originally that the holding would endure for a year, though it might be put an end to before the expiration of the year. In the present case, indeed, the parties say that the house is to be let "quarterly;" and if the agreement stopped there, the inference would be that they did not contemplate that the holding would continue for a year; but they proceed to say, that it shall be at a *yearly* rent payable on the *four usual quarter-days*. This seems to us to show quite as strongly as anything in the agreements in *The King* v. *Herstmonceaux*, (1) *Willesden* v. *Paddington* (2) and

(1) 7 B. & C. 551. (2) 3 B. & S. 593; 32 L. J. (M.C.) 109.

*The Queen* v. *Saint Giles, Cripplegate,* (1) that it was contemplated by the parties that the holding would continue for a year or more, though it might be put an end to before the expiration of a year. And the word "quarterly" will, we think, have sufficient effect given to it, by using it to shew that it was intended that the quarter's notice might terminate at the end of any quarter, without giving it the effect of nullifying these expressions. Had the word "quarterly" been omitted, and the words "ending on any quarter-day" been inserted at the end of the agreement, the effect of the agreement would have been precisely the same, both as to the continuance of the holding, and the mode in which it was to be determined. The case would have then been identical with *The King* v. *Herstmonceaux;* (2) and we think that we ought not to make a nice distinction between the effect of agreements, according to their words, when the intention of the parties as expressed by the words used and the legal effect of the agreements are identical.

It is important that points arising on settlement law, when once determined, should not be again disturbed, except on most cogent grounds; and we should therefore not feel justified in over-ruling the three cases already decided on this subject, although we may doubt the correctness of the original decision.

The order should therefore be affirmed.

*Order affirmed.*

(1) 4 B. & S. 509; 33 L. J. (M.C.) 3.
(2) 7 B. & C. 551.

1865
*Nov. 7.*

BRABANT, APPELLANT, WILSON, RESPONDENT.

*Copyhold—Waste of Manor—Consent of Homage—Condition—Enfranchisement—15 & 16 Vict. c. 51, and 21 & 22 Vict. c. 94—Compensation to lord.*

The lord of the manor of H., with the consent of the homage, granted a piece of the waste of the manor to C., to be held by copy of court roll, on condition that no buildings should be erected or trees or shrubs planted on the same, and reserving power to the lord and to certain copyholders to enter and remove any buildings erected or trees planted thereon. This reservation to the copyholders was without consideration. C. assigned the piece of land to B.; B. gave to the lord a notice under 15 & 16 Vict. c. 51 s. 2, of his wish to enfranchise:—

*Held*, that after the enfranchisement B. would have an estate of freehold discharged from the conditions; and that the lord was entitled to equivalent compensation.

CASE stated under the provisions of "The Copyhold Act, 1841," 4 & 5 Vict. cap. 35., and "The Copyhold Act, 1852," 15 & 16 Vict. cap. 57.

The appellant, William Hughes Brabant, is a tenant of the manor of Hampstead, and the respondent is Sir Thomas Maryon Wilson, lord of the manor.

According to the custom of the manor of Hampstead, in the County of Middlesex, the lord of that manor may, with the consent of the homage, make grants of parcels of the waste land of the manor to customary tenants of the manor.

On the 27th May, 1820, Sir T. M. Wilson, the then lord of the manor, at a special court that day holden for the manor, with the consent of the homage, granted to George Collings, a customary tenant of the manor, a parcel of the waste lands of the manor upon the following conditions in the grant, namely, that a good footpath four feet wide should be made on the south-west side of the piece of ground so granted, and that the piece of ground should be enclosed, and at all times thereafter should be kept enclosed with an open fence or paling not exceeding five feet from the level of the roads on the several sides of the piece of ground; that any hedge or shrubs planted next to the fence should not be suffered to grow above that height. That no erection or building should at any time thereafter be erected on the piece of ground, or any part thereof. By the grant there were reserved to the lord, his heirs and assigns, the several trees then standing on the piece of ground, with liberty for him, his heirs and assigns, at any time to

enter upon the ground, to cut, fell, take down, and remove the same for his and their own use, and there was also thereby reserved to the lord, and to the trustees of the Wells Charity Estate, within the manor for the time being, and also to the customary tenants for the time being of the copyhold messuages or tenements on the north-west side of the piece of ground, then belonging to Viscount Clifden, and his and their stewards and agents, full liberty and authority at any time after any building or erection which might thereafter be erected or set up on the piece of ground, contrary to the condition aforesaid, should be so erected, to enter upon the ground to pull down and remove any such erection or building at their pleasure, without any interruption by George Collings, his heirs and assigns; and there was also reserved by the grant to the lord, and to the trustees, and to his and their stewards and agents, like liberty and authority thereafter, in case any trees or shrubs should be planted upon the piece of ground which might obstruct or diminish the prospect from any part of the Charity Estate in a north-east direction towards and over Hampstead Heath, to enter upon the ground and to cut, or fell, and remove any such trees or shrubs at his and their pleasure, without any interruption by George Collings, his heirs and assigns, and free from all claim and demand by or from him or them in consequence of the exercise of the reservations, liberties, and authorities thereinafter reserved. The interest of George Collings, under the grant in the piece of ground, vested, in July, 1864, in William Hughes Brabant, who then became the purchaser thereof, and was duly admitted as tenant to the lord of the same. The conditions and restrictions contained in the grant of 1820 have not hitherto been broken or infringed, and the parties in whose favour those conditions and restrictions are created by the grant still have the same interests in their continuing in force which they had at the time of the grant.

Lord Clifden and the trustees of the Wells Charity Estate have no rights, either legal or equitable, as against the lord of the manor, beyond the conditions or restrictions contained in the grant to George Collings, and their respective rights (if any) thereunder, and there is no other deed or obligation between them other than the grant to George Collings.

1865

BRABANT v. WILSON.

In September, 1864, Mr. Brabant, under the provisions of the Copyhold Enfranchisement Acts, gave notice, in writing, to the lord of the manor of his desire to enfranchise the piece of ground and premises, and two valuers were duly appointed to assess the consideration to be paid to the lord for such enfranchisement. In the course of the valuation a question arose whether upon the enfranchisement of the piece of ground the conditions and restrictions contained in the grant against building and planting on the ground would continue to be in force, the valuer for the lord contending that they would not continue to be in force, and the valuer for Mr. Brabant contending that they would so continue. At the request, in writing, of the parties made in due time the question was referred to the Copyhold Commissioners, who, on the 13th day of February, 1865, made their decision, in writing, whereby,—after reciting the grant of 1820 to George Collings, and that it was material to the valuation of the gross sum of money to be paid for the enfranchisement of the copyhold tenement whether the conditions mentioned in the grant would so far continue in force after an award of enfranchisement as to prevent the owner for the time being of the freehold land from building, planting, and fencing upon such land, as he might have done if no such conditions had been contained in the grant, and so as to entitle any persons to enter upon such lands when so become a freehold tenure, and to pull down and remove any erections or buildings erected thereon, contrary to the conditions in the grant contained; and that the continuance or non-continuance in force of such conditions of such enfranchisement was a question of law material to the valuation,—the commissioners decided that the conditions and restrictions against building and planting contained in the grant would not continue to operate after the enfranchisement of the land. And at the request of the appellant they stated the above case.

The question for the opinion of the Court was, whether or not the restrictions against building and planting contained in the grant of 1820 will continue in force after the enfranchisement of the piece of land.

*Mellish, Q.C.* (*R. E. Turner* with him) for the appellant. It must be admitted that the condition cannot at law operate

as a grant, because Collings is not a party to the instrument containing it, and moreover the instrument is not under seal; but the restrictions against building and planting contained in the grant by the lord of the manor will continue after the enfranchisement to be binding on the appellant in a court of equity. Stipulations controlling the enjoyment of land, though void at law, can be enforced in equity, provided the person into whose hands the land passes took it with notice of the stipulation. A court of equity does not require the document to be executed with the same formalities as are required at law. In *Piggot* v. *Stratton*, (1) the court of equity enforced a mere representation by parol, it being contrary to good faith not to observe it. At law a covenant by an owner of land that it should never be built upon would not run for ever, and bind subsequent owners claiming through him, but a court of equity thinks it unjust that when a man has bought land under a stipulation that it shall not be built upon, and in all probability gave a less price for it, he should commit a breach of the stipulation; he would, therefore, be restrained from building; and so would all purchasers who took with notice; *Tulk* v. *Moxhay*. (2) What, then, is the natural inference to be drawn from the reservations contained in the grant? Is it not that the homage consented to the grant to George Collings on the condition that the land should not be built upon, and the moment that he or any purchaser from him taking with notice began to build upon the land a court of equity would restrain him? The statutes 15 & 16 Vict. c. 51, and 21 & 22 Vict. c. 94, passed for the enfranchisement of copyholds, cannot make any difference. If the land was originally granted, with the consent of the homage, on the understood terms, that it should not be built upon, and, if built upon, that Lord Clifden and the other persons should have a right reserved to them of entering to abate the nuisance, the lord cannot by enfranchising the land destroy the effect of that stipulation. If he could, it would have been useless to introduce into the grant these reservations in favour of Lord Clifden and the other persons.

*C. E. Pollock*, for the respondent. Without disturbing the

(1) John. 341, affirmed on appeal 1 De G. F. & J. 33; 29 L. J. (Ch.) 1.
(2) 2 Phillips, 774.

1865

BRABANT v. WILSON.

cases in equity the Court can uphold the decision of the commissioners. The commissioners are to find the value of the land. They have correctly assessed the compensation to be paid to the lord on the principle that the appellant will, on the enfranchisement, be tenant in fee, and that the restrictions and conditions contained in the grant to Collings will not be in force. In ordinary cases, the enfranchisement of land would convey a freehold; it would be as if a new estate were created, and such new estate would be discharged from all the incidents of copyhold tenure. In *Watkins on Copyholds*, p. 439, it is stated that enfranchisement "is the conveyance of the freehold; for the transfer of the freehold is of the very essence of enfranchisement." And again, at p. 450, it is laid down, "Immediately on the lands being enfranchised in fee they become severed from the manor and held of the lord above under the same tenure and services as the former or mesne lord held. The tenure, therefore, being extinct as to the enfranchising lord, he cannot consequently reserve to himself any services on such enfranchisement. He has no reversion in himself; he cannot reserve a right of escheat." The lord cannot seek to impose any condition on the estate after enfranchisement. It is equally clear that he could not impose a condition in favour of a third person, for such a condition would be undoubtedly void. In equity, if the vendee has made a stipulation in favour of the vendor, that he will use the land in a particular way, the right of the latter to a remedy does not depend on the question whether the covenant runs with the land, but whether the assigns of the original vendee had notice of the restrictive covenant at the time of purchase; and this is all that was decided in *Tulk* v. *Moxhay;* (1) but a court of equity would not, at the suit of a stranger, restrain the breach of a covenant entered into by the vendee with the vendor for the benefit of a stranger, such covenant being purely gratuitous. At law there is the insuperable difficulty that the reservation is to a stranger, and is merely gratuitous. Lord Clifden and the other copyholders have no legal interest, but even in equity it would be necessary to shew the relation existing between the lord of the manor and the person in whose favour the reservation is made. What

(1) 2 Phillips, 774.

privity of contract is there between these persons? None. It is true the waste cannot be converted into copyhold without the consent of the homage; but the homage merely act *qua* homage, and theirs is only an assenting act.

[COCKBURN, C.J. The homage have certain rights. Can the lord after their consent release? Their consent is a condition on which the lord may grant parcel of the waste.]

Whatever conditions were attached to the land and imposed by the homage must have been taken into consideration when the legislature allowed copyhold lands to be enfranchised, because then they become free from all conditions. The legislature must be assumed to have known what the effect of enfranchisement would be. Again, the homage concurred merely to create an estate of copyhold: when that estate is converted into freehold all their previously existing rights are destroyed.

*Mellish, Q.C.*, in reply. The consent of the homage is not merely a formal act, it is necessary to give validity to the conversion of the wastes into land of copyhold tenure. It is so laid down in *Scriven on Copyholds*, p. 23: "A custom for the lord of the manor to grant leases of the waste lands without restriction (the effect of which would be to enable him to annihilate the right of common altogether), is too unreasonable to be supported. So, also, would a custom to grant out the wastes of a manor by copy of court roll without the consent of the homage; though a custom which does not establish arbitrary power in the lord, but merely operates as a qualification of the rights of the tenants of the manor in favour of the lord, is good." Then is not the natural inference that where the consent of the homage was given with the conditions attached, those conditions were imposed for some purpose? It would seem as if the homage were not content to rely on the lord's being willing to enforce the conditions, but wished to reserve to themselves a power by which they might, without the action of the lord, compel compliance with them.

COCKBURN, C.J. I think our judgment should be in favour of the respondent, on the ground that the appellant will hold the land without being subject to any restraint. The reservation in the grant will not prevent him from applying this land to building



BIBL. LONDIN UNIV.

1865

BRABANT v. WILSON.

purposes, by which it would acquire a much greater value. The land was originally part of the waste of the manor. By the custom of the manor the lord, with the consent of the homage, may convert the waste part of the manor into copyhold tenure. A grant was made to a person named Collings in the first instance, from and through whom the appellant acquires title. It must be taken that the grant was made with the consent of the homage, with a special reservation in favour of Lord Clifden and certain other persons; but on the facts we must assume that this was done gratuitously, as regards the persons for whose benefit the reservation was made; and that this having been done gratuitously, neither Lord Clifden, nor the other persons named, nor their successors, could enforce the condition either against the appellant on the one hand, or against the lord of the manor on the other. There is nothing, I think, to shew that the lord or the homage, in insisting on this reservation, intended it for the general benefit of the copyholders. I think it was intended for the benefit of the persons expressly mentioned. But even if it were assumed that it was done for the benefit of the copyholders, it does not appear to me that the copyholders or homage would have, either at law or in equity, any *locus standi* to enforce this reservation against the grantee. The homage have the right to withhold their consent to the converting a portion of the waste into land of copyhold tenure; and they having once given that consent, and the lord having, with their consent, granted the waste, and converted it into copyhold, the interest of the homage in respect of that portion of the waste entirely ceased. It then became land of copyhold tenure, and they have no interest in it. If, however, a stipulation had been made on their behalf, all that could be said would be that it would be for the lord to enforce it. There might be a moral obligation upon him to do so; but I do not see how there could be an obligation either legal or equitable. Be that as it may, the waste having been converted into land of copyhold tenure, the statutes 15 & 16 Vict. c. 51, and 21 & 22 Vict. c. 94, passed for the purpose of the enfranchisement of copyholds, immediately obtained power and operation upon the lands; and by the 15 & 16 Vict. c. 51, at the instance of either lord or tenant, the act may be enforced compulsorily, and so the copyhold tenements may be enfranchised, with which the other copy-

1865

BRABANT v. WILSON.

holders who form the homage have nothing to do. The act of parliament gives full and absolute power to the lord and the tenant, either by the operation of a voluntary enfranchisement, or by the operation of the compulsory act; it gives power to these parties to convert that which was copyhold into freehold; and, as I just observed, with the machinery provided for that purpose by the enactments of the different statutes relating thereto, the copyholders who form the homage of the manor have nothing to do, and do not intervene. We have, therefore, before us the simple case of waste converted into copyhold, and that, under the act of parliament, is, at the instance of the tenant, about to be converted into freehold. We have only to look to what is fairly the value of the land. If there had been anything that would have enabled anybody to come forward and insist on and enforce the reservation preventing the tenant from building, undoubtedly it would have been in the highest degree unjust to compel the tenant to pay the lord of the manor the full value of the tenement, as though it could be applied to building purposes. The only person who could enforce the condition is the lord of the manor, and the lord of the manor insisting upon the full payment of the value, upon the footing of its being applicable to building purposes, would be estopped to all intents and purposes from making and enforcing performance of the condition. Consequently, under those circumstances, I think the lord of the manor becomes entitled to have the value of the copyhold tenement, upon the enfranchisement, estimated upon the footing of its being applicable without any restraint to building purposes. I think, therefore, the commissioners are right, and our judgment ought to be for the respondent.

MELLOR, J. I am of the same opinion. This is not the case of a person who has altered his position owing to a contract having been made with him. I cannot see anything in the cases in equity which applies to the circumstances of the case. That being so, it appears to me this case must follow the ordinary rule that, the homage having consented to the conversion of this piece of waste into land of copyhold tenure, so far as they are concerned they have no rights now as against the lord of the manor, or as against any person who comes in under the lord of the manor.

1865

BRABANT v. WILSON.

Without repeating the reasons the Lord Chief Justice has given, I concur in the conclusion at which he has arrived.

SHEE, J. I am of the same opinion. It appears to me that the lord of the manor, with the consent of the homage, had the power to convert the waste into land of copyhold tenure and grant it to Collings, but that it was granted with a condition which the lord of the manor alone could enforce; and, though in its terms it is a condition in favour, not only of himself, but also of other persons who are specially named, the lord's power to enfranchise remained intact; he retained exactly the same right to convert the tenure from base to free, that is, from copyhold to freehold; and he did not at all require the consent of the homage to entitle him to exercise that right. It seems to me that the statutes 15 & 16 Vict. c. 51, and 21 & 22 Vict. c. 94, enable the commissioners to enfranchise this piece of land effectually, and free it from all the incidents of copyhold tenure, and also from any condition which the lord alone could enforce.

LUSH, J. I am also of opinion that the decision of the copyhold commissioners is correct. The appellant at present holds the piece of copyhold land clogged with certain restrictions, among others with some that prohibit him from making use of it as building land. He desires to enfranchise that property. The question is, what estate will he have in it when he has enfranchised it? because if he has the pure fee simple, discharged of all restriction, so as to have power to use the land as he pleases, then, of course, he ought to pay to the lord an equivalent for the advantages which he would acquire. I take it, therefore, the question is whether, when the enfranchisement is complete, he will have an estate in fee simple clogged with such conditions as are imposed upon the copyhold, or whether he will have it free from all those conditions. Now the statute (21 & 22 Vict. c. 94, s. 10) says the award of the commissioners shall have the same force as a deed of enfranchisement would have had under the provisions of the former copyhold acts. Under the provisions of those acts, the deed of enfranchisement conveys to the copyholder an estate in all respects of freehold tenure, subject only to certain charges, if it be a part of the bargain that the payment of the enfranchisement moneys shall be made a charge; but subject to that he has an estate of

freehold tenure. I take it, therefore, to be perfectly clear that as soon as the enfranchisement is complete, he will have that estate free from all the conditions and restrictions, so far as respects the lord, or any person claiming under the lord. Then would any other person have any rights against him, when that enfranchisement is complete? It is said that the homage who consented to the original grant may possibly have some interest. I apprehend that the homage were called upon to give their consent to the lord granting that particular part of the waste. We must assume that this manor was under the custom that the waste might be granted with the consent of the homage, and when so granted the piece granted became demisable by copy of court roll. When, therefore, the homage had given their consent, that which had been a piece of waste became at once land of copyhold tenure, subject to all its incidents, and subject to the restrictions the lord himself had imposed, and those restrictions the lord only could enforce. The homage had lost all interest in the land when they gave their consent to the grant; they could no longer interfere; and if these restrictions were violated, the lord was the only person to enforce them. Then there were two other persons named, tenants of the manor, for whose benefit restrictions seemed to have been imposed; but they, according to the statement of the case, had no rights against the lord or anybody else, and that condition on the part of the lord, was merely gratuitous. The enfranchisement would benefit and free the estate from all restrictions whatever, and no other person would have any right at law or in equity to enforce those restrictions. Therefore I think the tenant ought to pay to the lord a competent sum for the acquisition.

*Judgment for the respondent.*

1865
*Nov.* 14.

LE CONTEUR *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

*Carrier—Carriers Act* (11 *Geo.* 4 *&* 1 *Wm.* 4, *c.* 68)—*Contract to carry partly by land and partly by sea.*

Where there is one entire contract to carry partly by land and partly by sea, the contract is divisible, and as to the land journey the carrier is within the protection of the Carriers Act, 11 Geo. 4 & 1 Wm. 4, c. 68.

CASE stated by an arbitrator, after declaration, the defendants being at liberty to rely on any defence open to them upon the facts.

The declaration alleged that the defendants were common carriers of passengers, with their luggage, from a place beyond the seas called the Island of Jersey, by steam-vessels across the sea to Southampton, and from Southampton overland by railway trains to the Waterloo Station, for reward to the defendants, and that the plaintiff, for one entire reward therefor, paid by the plaintiff to the defendants, became and, was, at the island aforesaid, at the request of the defendants a passenger to be by the defendants, as such common carriers, safely and securely carried by the same steam-vessel and railway train, with certain luggage of the plaintiff, amongst which was a chronometer, from the island aforesaid by a steam-vessel across the sea to Southampton, and from Southampton to Waterloo Station, overland, by a railway train, and to have the said luggage taken due care of by the defendants, for the purpose aforesaid, while it should be in their possession. Averment of all conditions precedent. Breach,—loss of the chronometer.

The defendants are common carriers for hire of passengers and their luggage between the island of Jersey and London, the portion of the journey between London and Southampton being performed by them as common carriers by land for hire, and the residue of the journey being performed by them as common carriers by sea for hire. The defendants were in the habit of allowing passengers between London and Jersey to pay one entire sum for a return ticket entitling a passenger to be carried, together with his ordinary luggage, from London to Jersey, *viâ* Southampton,

and back, without further payment, such passenger being at liberty to stop with his luggage at Southampton, either going or returning, for such period as he pleased, provided that the whole journey out and home did not exceed one calendar month. The plaintiff having taken and paid the defendants for such a return ticket, in London, and having been carried by the defendants, in consideration of the payment so made, from London to Jersey, afterwards became in Jersey a passenger to be carried on the return journey from Jersey to London, in consideration of the same payment, and to be so carried, with his ordinary luggage, which included the chronometer in the declaration mentioned. The plaintiff had not the chronometer with him on his outward journey from London to Jersey, but had it with him at the time when he commenced his return journey from Jersey to London. The luggage of the plaintiff, exclusive of the chronometer, was, on the return journey, stowed away by the defendants, apart from the plaintiff, but the plaintiff, when he became such passenger at Jersey, and during the whole of the voyage from Jersey to Southampton, himself kept the chronometer tied up in a handkerchief.

On the arrival of the plaintiff at the pier or wharf at Southampton, he left his luggage to be conveyed by the defendants to the railway station at Southampton, and from thence to London, by railway; but he carried the chronometer in his hand, tied up in the handkerchief, walking through certain streets of Southampton to the railway station, a distance of half a mile. On arriving at the railway station, the plaintiff went with the chronometer in his hand up to one of the railway carriages going to London, and gave the chronometer to a porter of the defendants, and who then, in the presence of the plaintiff, placed it on the seat of the carriage. Both the porter and the plaintiff immediately after this left the platform together, the porter to attend to other duties, and the plaintiff to look after the rest of his luggage, which had not arrived from the custom-house. The plaintiff remained absent for some ten or fifteen minutes; when he returned at the end of such time the chronometer was not to be found.

The plaintiff did not at any time declare the value and nature of the chronometer, the value of which, in fact, exceeded 10*l*.

1865

LE CONTEUR v. LONDON AND SOUTH WESTERN RAILWAY CO.

The defendants did everything to entitle them to the protection of the 11 Geo. 4 & 1 Wm. 4, c. 68, supposing that statute to apply to this case.

The question for the opinion of the Court was, whether, upon the facts above stated, the plaintiff was, in point of law, entitled to recover in respect of the loss of the chronometer.

If the Court should decide in the affirmative 25*l.* was awarded as damages for the loss of the chronometer.

*Joseph Brown, Q.C.*, for the plaintiff. The question in this case is, whether the Carriers Act, 11 Geo. 4 & 1 Wm. 4. c. 68, affords any defence to this action.

[COCKBURN, J. There is a preliminary question as to liability on part of the company. It seems to me that the plaintiff withdrew the chronometer from the custody of the company. He gave the chronometer to a porter, and, it must be inferred that he directed it to be put in his carriage to travel with him. It is, therefore, put in a place where luggage is not usually carried, and that at the wish of the plaintiff. Is the chronometer in the custody of the company or of the passenger? MELLOR, J. The company have a proper place for carrying luggage; are they liable if the passenger directs an article to be put into a particular carriage to travel with him?]

No doubt, if the passenger intended to assume the entire charge of the chronometer the company would not be liable; but the facts, as disclosed in the case, only find "that the plaintiff gave the chronometer to a porter of the defendants, who then, in the presence of the plaintiff, placed it on the seat of the carriage." In *Chitty on Contracts*, 7 edit. 440, it is laid down, "Goods will be held to have been delivered to a carrier when they have been placed in his hands in an ordinary way in which he consents to receive them. And, accordingly, where a passenger by railway took an article of value openly and notoriously into the same carriage in which he was to travel, it was held that this did not save the company from responsibility for its loss;" citing *Richards* v. *The London, Brighton, and South Coast Railway Company.* (1) However, the main defence set up by the company is

(1) 7 C. B. 839.

that they are protected from liability by the Carriers Act. But the protection afforded by that act is confined to carriers by land and to a journey by land, it has no application to a journey partly by land and partly by water. Here there is a compound journey with a return ticket to carry the plaintiff and his luggage partly by land and partly by water. The recital in the Carriers Act is, "Whereas, by reason of the frequent practice of bankers, and others, of sending by the public mails, stage coaches, waggons, vans, and other public conveyances *by land*, for hire, parcels, &c.," shewing it was clearly the intention of the legislature that the act was to apply only to cases where there is a contract to carry by land for the whole journey, but not where there is an entire contract to carry partly by land and partly by water.

[COCKBURN, J. Why should not the contract be divided into parts, and be subject to the incidents attached to each part, according as the loss takes place in one part or other of the journey?]

To hold so, would be to impose on carriers a liability differing according to the law ruling in the countries which are traversed by the journey. In *The Peninsular and Oriental Steam Navigation Company* v. *Shand*, (1) Mr. Shand took a ticket in England for a passage from Southampton to Alexandria, and from Suez to the Mauritius; he brought an action against the company for the loss of a portion of his luggage, and it was held in the Privy Council that the contract having been made in England must be construed by the English law, and that it was not within the Carriers Act or the Railway and Canal Traffic Act (17 & 18 Vict. c. 31).

[MELLOR, J. In that case there was no land carriage in England at all.]

*Brandley* v. *The South Eastern Railway Company* (2) also shows that the contract must be determined by the *lex loci contractus*. It is, however, only right to mention that in *Pianciani* v. *The London and South Western Railway Company*, (3) where the contract was by the defendants as common carriers to carry by railway from London to Southampton and thence to Jersey by steam-vessels, the court held a plea under the Carriers Act to be a good defence to an action by the plaintiff for the loss of his portmanteau,

(1) 13 W. R. 1049. (2) 12 C. B. (N. S.) 63. (3) 18 C. B. 226.

1865

LE CONTEUR v. LONDON AND SOUTH WESTERN RAILWAY CO.

containing silks, and furs, and other articles enumerated in the act. Again, the carrier is not entitled to claim exemption under the act unless he affixes a notice in legible characters in some public and conspicuous part of the office where parcels are received, stating the increased rate of charge required to be paid over and above the ordinary rate of carriage. Now, if the act applies, one consequence would be that the passenger, after he had performed the sea portion of his journey, would have to go to the office, he would have to ascertain what the additional charge for the extra risk of carrying the articles enumerated in the act would be, and he would have to pay that extra charge; so that to hold a contract to carry partly by land and partly by water divisible, would be to impose upon the passenger the necessity of making a second contract in the middle of his journey; on some occasions, especially if he were travelling by an express train, it would be impossible for him to do so. Secondly, the articles enumerated in the 1st section are, ". . . . . gold and jewellery, watches, clocks, or time-pieces, &c.;" it is submitted that a chronometer is not a time-piece. Lastly, it may be contended on behalf of the defendants that a chronometer is not ordinary luggage: but the plaintiff is a master mariner, and a chronometer is a necessary instrument for the navigation of his ship. All the cases on this point are collected in *The Belfast and Ballymena Railway Company* v. *Keyes* (1).

*C. W. Wood* (*J. H. Mangles* with him), for the defendants, was not called upon.

COCKBURN, C.J. On consideration we think it unnecessary to call upon the defendants' counsel. When the case was first opened I had imagined that the facts were such, as to lead to the necessary inference that the plaintiff had taken possession of the chronometer, withdrawing it from the custody of the company, and keeping it in his own personal custody and charge; but I think my first impression was incorrect. I think it appears that what took place was this, that by the desire of the plaintiff, the porter of the company placed this article in a carriage, in which a particular seat was to be appropriated to the use of the plaintiff. I am very far

(1) 9 H. L. C. 556.

1865

LE CONTEUR v. LONDON AND SOUTH WESTERN RAILWAY CO.

from saying that there may not in these cases sometimes be a state of circumstances in which a passenger, who has luggage which, by the terms of the contract, the company are bound to convey to the place of his destination along with him, may not release the company from their obligation, as carriers for the safe custody of the article, by taking it into his own personal custody and charge: but, I think, the circumstances must be strong to relieve the company from their liability; it is not because the article that is part of the passenger's luggage to be conveyed with him is, by the joint consent of the passenger and the company, placed in a carriage with him, that the company are necessarily released from their obligation to carry safely. Nothing could be more inconvenient than that the practice of placing small articles, which it is convenient to the passenger to have with him in the carriage in which he is about to ride, should be discontinued; and if the company were, from the mere fact of articles of this description being placed in a carriage with a passenger, to be at once relieved from the obligation of safely carrying such articles, it would follow that no one who has occasion to leave the carriage temporarily would be able to have them with him with any degree of safety. I cannot think, therefore, we ought to come to any conclusion, which would relieve the company under such circumstances from the obligation, as carriers, to carry the luggage safely, which, for general convenience, ought certainly to attach to them. I cannot help thinking, therefore, we ought to require very special circumstances indeed, and circumstances leading irresistibly to the conclusion that the passenger takes such personal control and charge of his luggage as to altogether give up all hold upon the company, before we can say that the company, as common carriers, would not be liable in the event of the loss; and if, therefore, this case had depended upon the question whether or not the company were liable upon the general issue, I should be of opinion that the plaintiff was entitled to recover.

But the defence of the company is mainly rested on the ground that the case is ~~not~~ within the Carriers Act.

Now, it cannot be disputed that the article in question was an article that came within the provisions of the Carriers Act; but it was said that the provisions of the act were not applicable to the

1865

LE CONTEUR v. LONDON AND SOUTH WESTERN RAILWAY CO.

case, because the contract was one to carry not only to the terminus of the railway by land, but also by water; and that such a contract being to carry both by land and by water, the contract was not divisible; and therefore, although the article was lost on land, that it was not within the terms of the Carriers Act. I think that that argument fails both on principle and on authority; on authority, because the point was directly before the Court of Common Pleas in the case of *Pianciani* v. *The London and South Western Railway Company*, (1) in which the court expressed the strongest opinion that the contract was divisible; and that so far as the carriage by land was concerned, the Carriers Act would afford a protection and defence to the company, in the event of the terms of that act not being complied with; and I must say I entirely concur in the view so taken and expressed by the court. It would be a matter of the most serious inconvenience if companies, established for the purpose of conveying goods by land, but having one of the termini of their railway connected with water communication, should be prevented (as they would practically be) from affording the public the great accommodation which arises from being able to send goods to the ultimate place of destination, the water carriage included, without the necessity of separate contracts with separate companies. If that accommodation were withdrawn from the public, as it might be, if, so far as the land carriage is is concerned, companies were deprived of the protection the act of parliament affords, it would be a matter of very serious inconvenience and damage to the public; and I see no reason why that damage and inconvenience should be inflicted upon the public, at the same time that loss would accrue to the companies from not having the opportunity which they at present possess of making the entire contract. I see no reason why the contract should not be held to be divisible, and the carrier protected so far as the land carriage is concerned by the act of parliament. On principle and authority the company are entitled to the protection of the Carriers Act; and on that part of the case I think our decision should be for the company.

MELLOR, J. I am of the same opinion. I think the circumstances stated in the case, as found by the arbitrator, fall short of

(1) 18 C. B. 226.

shewing that the plaintiff did take out of the care and custody of the company as carriers the article in question. I agree with the Lord Chief Justice that a state of circumstances might occur in which a person might take so entirely the charge and care of any particular article, as to relieve the company from their liability as common carriers; but here the facts do not disclose a case of that description.

The only question is, the company having the care of the chronometer as common carriers, are they relieved from their liability by reason of its being one of the articles enumerated in the Carriers Act? I think they clearly are. Mr. Brown's contention could not be serious on the question as to whether this was one of the articles enumerated in the Carriers Act; but the serious argument was, that this was a compound contract, partly to be performed on land and partly to be performed on water; and he argued that the act must be confined to cases where the contract was to carry by land only. I can see nothing in the statute to give effect to the argument. On the contrary, it appears to me clear that the contract may be to carry partly by land and partly by water; the protection is given to the carrier by land in England; and, therefore, as this was a loss in the transit from Southampton to London, it was a loss for which the company would have been liable except for the Carriers Act. I think the Carriers Act does exempt in respect of the loss of this description, where the contract was to carry partly by land and partly by water, and the loss occurred on the transit by land.

SHEE, J. I am of the same opinion. I think the company had possession of the chronometer as carriers, and there is nothing in the circumstances stated in the case to relieve them from liability. On the second point I think *Pianciani* v. *The London and South-Western Railway Company*, (1) exactly meets the case. I think it is rightly decided, and we are bound by it.

LUSH, J. I am of the same opinion. The first question is, whether this chronometer was delivered to and accepted by the company as carriers. The contract was to carry the passenger with his ordinary luggage; and the case states, on arriving at the station at Southampton, the passenger took his chronometer in his hand,

(1) 18 C. B. 226.

1865

LE CONTEUR v. LONDON AND SOUTH WESTERN RAILWAY CO.

gave it to the porter of the defendants, and the porter then, in his presence, placed it upon the seat. The passenger went away for some purpose; while he was gone the chronometer was stolen. The porter was there for the purpose of assisting the passenger in removing his luggage, which the railway company had contracted to carry. The railway company might have said, "Whilst carrying this upon the seat of the carriage, it is not safe, we will put it where we think it more safe." We know it is the every day practice for passengers to carry, with the consent of the company, carpet-bags, books, and cloaks, and things they want upon the journey, in the carriage with them. It cannot be said the things are not in the custody of the company as carriers, because they agree, at the passenger's request, to place them in the carriage where he sits. There is no fact to shew that this passenger, who was entitled to have his luggage carried by the defendants with the ordinary liability of carriers, took it out of their custody, or relieved them from that obligation.

The next point is, are the defendants protected by the Carriers Act? On that, I entirely agree they are. The statute says, "No carrier by land shall be liable to the loss or injury of certain articles above the value of 10*l*., unless the value is declared and the increased charge paid." The chronometer, it cannot be doubted, is one of the articles enumerated in the act, because it describes time-pieces of every description, and the chronometer is found to be above the value of 10*l*. Then, according to the terms of the act, the defendants being carriers by land, are not liable for the loss. But it is contended because the contract is to carry partly by water and partly by land, that they are not within the protection of the act. They are not less carriers by land because they engage to carry by sea. Supposing another act had passed protecting carriers by sea on certain conditions, according to the argument of Mr. Brown, the carrier who engaged by a single contract to carry both by land and sea would be out of the protection of either act. I apprehend they are not the less carriers by land because part of the contract is to carry by sea. I think this being an article within the statute, being above the value limited, and not declared, the company are not liable. Mr. Brown has contended there would be inconvenience in thus holding, because a passenger who arrives

from France would be obliged to go to the office and declare the value. How that may be it is not necessary to decide. It may be that the carrier who makes the contract in Paris may be required to bring himself within the act, and to have a notice put up in the office in Paris. That question does not arise in the present case, because it is found that the defendants did everything to entitle them to the protection of the act.

*Judgment for the defendants.*

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WORTHINGTON AND ANOTHER *v.* HULTON, CLERK TO THE LOCAL BOARD OF HEALTH OF MOSS SIDE.

*Nov. 20th.*

*Public Health Act* (11 & 12 *Vict. c.* 63), *s.* 89—*Time for making Rate*—*Mandamus to enforce Claim.*

The Public Health Act (11 & 12 Vict. c. 63), s. 89, enacts that rates may be made "retrospectively, in order to raise money for the payment of charges and expenses which may have been incurred at any time within six months before the making of the rate":—

*Held*, that the Court might grant a mandamus ordering a rate to be made in order to satisfy a judgment obtained within six months before the claim for the writ, though the action, in which the judgment was obtained, was commenced more than six months after the right of action accrued, provided the delay is excused and shewn not to have been undue.

The plaintiff in 1858 entered into contracts with the defendants, a local board of health, for the execution of works for the board, to be paid for out of money to be collected from those on whom the works were chargeable under the Public Health Act. The contracts were duly performed by the plaintiff. The notices given by the defendants turned out bad, and many of those who would otherwise have been liable refused to pay the sums assessed upon them. This became known to the plaintiff in February, 1860, and he then made a demand on the defendants. They were in hopes of being able to collect the money, notwithstanding the badness of the notices, and 800*l.* was in fact collected and paid over to the plaintiff, the last payment being in November, 1860, leaving a balance of more than 3000*l.* due to the plaintiff, and he commenced an action against the defendants early in the following December. Judgment was obtained by the plaintiff, and within six months he commenced an action, claiming a writ of mandamus commanding the defendants to levy a rate to satisfy the judgment:—

*Held*, that the delay in commencing the original action was excused and shewn not to be undue, and that a peremptory writ might be granted.

IN this action a writ was issued in July, 1862, against Sullow, the then clerk of the Local Board of Health of the non-corporate

1865

WORTHINGTON v. HULTON.

district of Moss Side, to whom the present defendant afterwards succeeded. The plaintiffs claimed by their declaration a writ of mandamus commanding the board to levy a rate for the purpose of satisfying a judgment for 3467*l.* 11*s.* 8*d.*, recovered on the 8th of the previous May, in an action commenced on the 10th of December, 1860. (1)

On the case coming on for argument on demurrers to the declaration and pleas, a special case was ordered to be stated. As the Court had power to draw inferences of fact, the statement of the facts in the judgment, with the view the Court took of them, is sufficient without setting out the facts at length, as given in the special case.

The case was argued in Easter Term, 1865, by

*Mellish, Q.C.* (*R. G. Williams* with him), for the plaintiffs.

*T. Jones* (*Crompton Hutton* with him), for the defendant. (2)

*Cur. adv. vult.*

Nov. 20. The judgment of the Court (Cockburn, C.J., and Blackburn and Mellor, JJ.) was delivered by

MELLOR, J. This is a case in which the plaintiffs claim a writ of mandamus to be directed to the Local Board of Health of Moss Side, to make and levy a district rate for the payment of a judgment obtained by the plaintiffs against the local board.

The plaintiffs, in the year 1858, had entered into four contracts with the local board for the execution of works for the board. By these contracts the plaintiffs were to be paid out of the money as collected from those on whom the expenses of the works were chargeable under the Public Health Act. The contracts were duly performed by the plaintiffs. It unfortunately happened that the notices given by the local board to the owners were informal, (3) and consequently that they could not be enforced against such as resisted them. Some time elapsed before it

(1) See Worthington *v.* Sudlow, 2 B. & S. 508; 31 L. J. (Q. B.) 131.

(2) The case having been argued before Michaelmas Term, the reporters have no note of the argument and cases cited.

(3) Under s. 69 of 11 & 12 Vict. c. 63; see Worthington *v.* Sudlow, 2 B. & S. 508; 31 L. J. (Q. B.) 131.

was known that any objection would be made by any one, and some further time necessarily elapsed before it was ascertained that the objections were valid; but, at all events, as early as February, 1860, it was known to the plaintiffs that the notices were defective, and in that month their solicitor applied to the local board.

The writ on which the judgment sought to be enforced was obtained did not issue until the 10th of December, 1860, more than six months after the plaintiffs were aware of the facts constituting their cause of action.

The reasons of this delay are stated in the case. It appears that the local board were still in the expectation of being able to collect the money, notwithstanding the badness of the notices, and that they did, in fact, obtain 800*l.*, which was paid over to the plaintiffs, the last payment being as late as in November, and only a few weeks before the writ on which the judgment was obtained issued.

Power is reserved in the case to draw inferences of fact; and we draw the inference that, under such circumstances, there was no improper delay or laches on the part of the plaintiffs, nor any blame imputable to them or their advisers. Still, it is undeniable that a period of more than six months elapsed, during which the plaintiffs might practically have commenced their action, and did not.

The plaintiffs recovered judgment in this Court for upwards of 3000*l.* The present writ was issued within six months after the judgment; and everything subsequent to the judgment is admitted to have been right. The one point, therefore, which we have to decide is whether the delay, in fact, of more than six months in commencing the original action is a bar to the plaintiffs' claim for a mandamus to make the rate, though that delay is shewn to be excused by the circumstances, so as not to be improper or to amount to laches.

There are only two cases decided which in any way bear upon the subject. In *The Queen* v. *Rotherham Local Board* (1), the action was commenced in July, 1856, being within six months after the cause of action accrued. Judgment was signed in that month

(1) 8 E. & B. 906; 27 L. J. (Q. B.) 156.

1865

WORTHINGTON v. HULTON.

under a judge's order, by which execution was stayed till the 27th of December, 1856, being more than six months after the cause of action had accrued. A writ of mandamus was obtained on the 10th of June, 1857, more than six months after the judgment was signed, but within six months after it was enforceable. The decision of the court was that the judgment was a fresh charge on the day when the judgment was enforceable, and that the postponement of the execution by arrangement with the local board was not objectionable. This latter part of the decision, that a delay by arrangement with the local board was not fatal to the plaintiff's claim, affords an argument in favour of the present plaintiffs' contention, that a delay rendered reasonable by the circumstances is not necessarily fatal, though certainly it falls short of a positive decision in their favour.

In *Burland* v. *Hull Local Board of Health*, (1) the plaintiffs had a cause of action against the local board for money had and received, which had accrued in 1856; the action on which judgment was signed by default had been commenced in 1862, very nearly six years after the cause of action had accrued, and there was nothing whatever to explain or excuse this very long delay. This court, under such circumstances, gave judgment against the plaintiff's claim for a mandamus. Our late Brother Wightman used language that seems to indicate an opinion, that it was essential that the action should be commenced within six months after the accruing of the cause of action. This is in favour of the defendants, though it was not the point in the case. The other three members of the court do not intimate any such opinion. The Lord Chief Justice in his judgment said:—"I protest against the doctrine that in order to get the benefit of any judgment, no matter what, the jurisdiction of this court is to be invoked to give subsidiary aid by mandamus," and in substance the other two judges said the same. And all that was necessary for the decision of the case, and all that can be considered as really decided by it was, that a plaintiff could not claim as of right a mandamus to enforce a judgment where there was great and unexcused delay in commencing the original action.

We are, therefore, called upon to decide this point for the first

(1) 3 B. & S. 271; 32 L. J. (Q. B.) 17.

time, unassisted, but at the same time unfettered by authority. The legislature in the Public Health Act (11 & 12 Vict. c. 63) s. 89, has enacted that rates may be made "prospectively, in order to raise money for the payment of future charges and expenses, or retrospectively, in order to raise money for the payment of charges and expenses which may have been incurred at any time within six months before the making of the rate." This language shews that they were alive to the desirability, that the charges which were to be defrayed by a fluctuating body of ratepayers, should be levied promptly; but the attention of the legislature does not seem to have been drawn to the probability, that it might not always be possible to ascertain and enforce a claim against the board within six months after the claim has accrued.

The *Rotherham case,* (1) decides that a judgment, when properly obtained, is a charge within the meaning of this section; and when that is decided, the case is within the literal words of the section. We feel that there is great difficulty in the case; but on the whole, we think that we best effectuate the intention of the legislature, and at the same time further the ends of justice, by holding, that a rate may be ordered in aid of a judgment within six months after that judgment was obtained, though the action on which the judgment was obtained was commenced more than six months after the claim accrued, if the delay is excused and shewn not to have been undue. We do not mean to throw any doubt on the decision in *Burland* v. *Local Board of Hull,* (2) that where there has been undue delay the mandamus should not go. In the present case we think that the delay is explained and justified, and we, therefore, give judgment for the plaintiffs.

*Peremptory writ of mandamus awarded.*

(1) 8 E. & B. 906; 27 L. J. (Q. B.) 156.
(2) 3 B. & S. 271; 32 L. J. (Q. B.) 17.

1865
*Nov. 22.*

## THE QUEEN *v.* THE JUSTICES OF THE PARTS OF LINDSEY.

*Highway—Appointment of first meeting of Highway Board—25 & 26 Vict. c. 61, s. 10, and 27 & 28 Vict. c. 101, s. 10.*

By the 54 Geo. 3, c. 91 s. 1, overseers of the poor are to be appointed on the 25th March, or within fourteen days after it; by the 5 & 6 Wm. 4, c. 50, s. 6. surveyors for the highways are to be appointed at the same time. By the 25 & 26 Vict. c. 61, s. 10, waywardens in every parish of a highway district are to be elected in the same manner, and subject to the same regulations, as surveyors of highways were chosen or appointed before this act. By the 27 & 28 Vict. c. 101, s. 10, the first meeting of a highway board after the formation of a district under the 25 & 26 Vict. c. 61, is to be held at such time as may be appointed by the provisional or final order of justices constituting the district, "so that the time appointed be not more than seven days after the expiration of the time limited by law for the election of waywardens":—

*Held*, that a final order of quarter sessions made in April, 1865 (confirming a provisional order of October, 1864), which ordered that the first meeting of the highway board to be elected for the highway district should be held on the first Thursday after the 25th of March, 1866, was good: for that the sessions were not bound to appoint a day after the expiration of the time limited by law for the election of waywardens; though, as a matter of practice, it would have been better to have postponed the day to one of the seven days after such limited time.

This was a rule calling on the Justices of the Parts of Lindsey, in the County of Lincoln, to shew cause why a writ of certiorari should not issue to bring up, for the purpose of quashing it, a final order of quarter sessions, confirming a provisional order, constituting certain parishes "the Isle of Axholme Highway District."

*Hayes, Serjt.* and *Mellor* (Nov. 20,) shewed cause.

*Keane, Q.C.* and *Cave* were heard in support of the rule.

One or two objections were abandoned by the prosecutor's counsel without any argument at all. The following objection was partially discussed,—that there was no provision made in the provisional order, as required by section 10 of the 25 & 26 Vict. c. 61, for the election of waywardens in certain "highway" parishes mentioned in the order, in which, previously to the formation of the district, no surveyors had been elected; but *Hayes, Serj.*, pointed out that this objection was obviated by the following clause in section 7 of the 27 & 28 Vict. c. 101, "where, previously to the passing of the provisional order forming a highway district, no

surveyors or waywardens have been elected within any highway parish in that district, and where the mode of electing a waywarden or waywardens in such parish is not provided for by this act, or 'the Highway Act, 1862,' the justices shall, by their provisional and final orders constituting the district, or by *any subsequent* provisional and final orders, make provision for the annual election of a waywarden or waywardens for such parish;" and upon this, *Keane* abandoned the objection.

The only objection which was argued was that noticed by the Court, the validity of which depended entirely on the sections of the acts of parliament set out in the judgment.

*Cur. adv. vult.*

Nov. 22.—The judgment of the Court (MELLOR and SHEE, JJ.) was delivered by

MELLOR, J. In this case a rule *nisi* was obtained by Mr. Keane for a certiorari to remove a final order made at the quarter sessions, holden at Kirton, for the parts of Lindsey, in the county of Lincoln, on the 7th of April last, whereby it was ordered that a provisional order of the 20th of October, 1864, the confirmation of which had been duly respited to those sessions, should be finally ordered to be confirmed, and the same was confirmed. By which final order it was also ordered that the first meeting of the highway board to be elected for the Isle of Axholme highway district should be held at the police station at Epworth, in the said district, on the first Thursday after the 25th day of March, 1866, at 11 o'clock in the forenoon.

Two objections which had been made to the order were abandoned by Mr. Keane during the argument, and the only point remaining for consideration was the appointment of the day for holding the first meeting of the highway board, which it was alleged "was fixed contrary to law, and in violation of the 25 & 26 Vict. c. 61, s. 10, the 5 & 6 Wm. 4, c. 50, s. 6, and the 54 Geo. 3, c. 91, s. 1."

By the 54 Geo. 3, c. 91, s. 1, overseers of the poor are to be appointed on the 25th of March, or within fourteen days next after it. By the 5 & 6 Wm. 4, c. 50, s. 6, it was enacted, that the inhabitants of any parish maintaining its own highways should, at their first meeting for the election of overseers of the poor, proceed

1865

THE QUEEN v. THE JUSTICES OF LINDSEY.

to the election of one or more persons to serve the office of surveyor in the said parish for the year next ensuing; and that in any parish in which there is no meeting for the nomination of overseers of the poor, the inhabitants contributing to the highway rate shall meet at the usual place of public meeting on the 25th of March, and if that day should fall on Good Friday or on Sunday, *then on the day next following*, or within fourteen days next after the said 25th day of March in every year. Such were the provisions for the election of surveyors of the highways at the time of the passing of the 25 & 26 Vict. c. 61, which gave large powers to justices in quarter sessions to form highway districts for the more convenient management of highways. The first thing to be done was to make a provisional order constituting the highway district, which was, in order to its validity, to be confirmed at some subsequent court of general or quarter sessions to be held within a period of not more than six months. By section 6 of that act various regulations were enacted as to the making, confirmation, and approval of the orders for forming a highway district; and by regulation 5 it was provided "that the provisional order might, and that the final order should state the time, not being more than seven days after the first election of waywardens, and the place at which the first meeting of the board was to be held." This regulation was repealed by the 27 & 28 Vict. c. 101, s. 10, and in lieu thereof it was enacted that "the first meeting of the highway board, after the formation of a district, shall be held at such time as may be appointed by the provisional or final order of the justices, *so that the time appointed be not more than seven days after the expiration of the time limited by law* for the election of waywardens; or in case of a special day being appointed for such election as thereinafter mentioned, be not more than twenty-one days after that day." Provision for the election of waywardens is made by the 10th section of the 25 & 26 Vict. c. 61, in the same manner as surveyors of the highways would have been chosen or appointed if that act had not passed; and the 7th section of the 27 & 28 Vict. c. 101, makes provision for places, in which previously to the passing of the provisional order forming a highway district no surveyor had been elected, and no provision made by the previous Highway Act of 1862.

In the highway district for the Isle of Axholme the election of waywardens will have to be made at the time and in the manner in which surveyors of highways were formerly elected for the various parishes forming part of that district, viz.: on the 25th of March, or in case that fall on Good Friday or Sunday, then on the day next following, or within fourteen days next after the 25th day of March. The final order constituting this district orders that the first meeting of the highway board for the Isle of Axholme highway district shall be held at the police station at Epworth, in the said district, on the first Thursday after the 25th day of March, A.D. 1866, at eleven o'clock in the forenoon. Under these circumstances, Mr. Keane contended that the order is bad, inasmuch as it unduly circumscribes the time allowed by law for the election of waywardens for the several parishes within the district, and indirectly limits the time for the nomination of the overseers of the poor in parishes, in which the surveyors of highways were formerly elected at the same meeting at which overseers of the poor were elected. On the other hand, it was contended by Serjeant Hayes that the order was clearly within the power of the justices at sessions to make, inasmuch as the time appointed for the meeting was not more than seven days after the expiration of the time limited by law for the election of waywardens, and that there was nothing to compel the parties to postpone such meeting for fourteen days after the 25th of March, and to fix it on one of the seven days thereafter.

We have come to the conclusion that, although it would have been better to have postponed the day of meeting to one of the seven days after the expiration of the time limited by law for the election of waywardens; yet, inasmuch as the day actually appointed allows a reasonable and sufficient time for the various elections of waywardens to take place, according to the practice which has prevailed in the district for the last eight years in the election of surveyors of highways, we see no reason for quashing this order.

It seems that no real inconvenience will result from our supporting it; and although, as we have already said, it would have been a more prudent course for the sessions to have appointed a later day, we cannot fail to observe that the 5 & 6 Wm. 4, c. 50, s. 6, directs the inhabitants to meet for the election of surveyors

1865

THE QUEEN v. THE JUSTICES OF LINDSEY.

of the highways on the 25th of March, and if that day should fall on Good Friday or Sunday, *then on the day next following*, or within fourteen days next after the said 25th day of March. In order to entitle the applicants to have this order quashed, they ought to shew that the court of quarter sessions were *bound* to *appoint* a day after the expiration of the time limited by law for the election of waywardens, this they have failed to do; and we are therefore of opinion that the rule should be discharged with costs.

*Rule discharged with costs.*

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*Nov.* 15.

THE QUEEN, *on the prosecution of* ASTLEY AND ANOTHER, RESPONDENTS,

*v.*

SPURRELL AND WALKER, APPELLANTS.

*Poor—Overseers—*43 *Eliz. c.* 2, *s.* 1—"*Substantial Householder*"—*Master and Servant—Landlord and Tenant.*

10 QB 427
QBD 148

Where a servant occupies premises of his master, without paying rent, as part remuneration for his services, in order to ascertain whether the servant is a "substantial householder" within the 43 Eliz. c. 2, s. 1, so as to be eligible to the office of overseer of the poor, the question is whether the occupation is subservient and necessary to the service; if it is, the occupation is that of the master; if it is not, the occupation is that of a tenant, and the servant is a "householder."

UPON appeal to the Norfolk Quarter Sessions against an order of justices, appointing John Spurrell and William Walker, "substantial householders within the Parish of Pudding Norton," to be overseers of the poor of the said parish, the order was confirmed subject to the opinion of this Court upon the following case:—

The appellant John Spurrell is tenant of a farm of 812 acres, together with a farm house and premises and a cottage adjoining and forming part of the premises, but fifty yards or more from the farm house at one entire rent, such cottage being a separate and distinct tenement. The farm is co-extensive, with the parish of Pudding Norton, and John Spurrell resides with his family and servants in the farmhouse, which, excepting the cottage, is the only human habitation in the parish. The appellant, William Walker, is farming bailiff to Spurrell, and looks after the men. He is a weekly servant, and receives 14*s.* a week wages, and occu-

pies the cottage (which is furnished with his own furniture), rent free, in part payment of his services. But for the cottage his wages would be higher. No poor-rates are paid for the parish of Pudding Norton, but Spurrell pays to the treasurer of the Walsingham union, which comprises the parish, the county-rate in respect of the farm premises and cottage.

The parish of Pudding Norton is an immemorial parish and rectory. The church is in ruins; the present rector was appointed in 1864, and receives the tithes.

On behalf of the appellants it was contended that William Walker was not "a substantial householder" within the meaning of the 43 Eliz. c. 2, s. 1. The court of quarter sessions gave the following judgment:—

"We find that under the circumstances of this case both appellants were substantial householders within the meaning of the 43 Eliz. c. 2, s. 1, and we confirm the order subject to a case," &c.

The question for the Court was, whether William Walker was a "substantial householder" within the 43 Eliz. c. 2, s. 1.

*Denman, Q.C.*, for the respondents. The appellant Walker was a "substantial householder." All that is necessary is that he shall occupy a house which he can call his own. He, in fact, pays rent, for if he did not live in the house he would have so much more wages. This very case was before Crompton J. in the Bail Court in *In re Pudding Norton* (1) and he was inclined to think the man was a householder."

[MELLOR, J. In *The King* v. *Stubbs* (2) the overseer was a servant.]

The Court then called upon

*Mellish, Q.C.*, and *Bulwer, Q.C.*, for the appellants. This is just like the common case of a farm bailiff or gamekeeper receiving weekly wages with the liberty of using a certain part of the premises of the master, and it makes no difference that it happens to be an entire cottage. There can be no tenancy here, for a servant is always liable to be dismissed at a moment's notice for misconduct, and his occupation must cease on the determination of his service, the servant has no occupation independent of his

(1) 33 L. J. (M C.) 136. (2) 2 T. R. 395.

1865

THE QUEEN v. SPURRELL.

service. The occupation is, in fact, the master's: *Bertie* v. *Beaumont.* (1)

[COCKBURN, C.J. The occupation of this particular cottage is not found to be necessary for the service.]

This is the only cottage in the parish, and it is therefore clear that the occupation of it, if not absolutely necessary to the service, was most convenient for it. In *The King* v. *Kelstern* (2) Bayley, J. says: "I take the distinction laid down in *The King* v. *Minster* (3) to be this, that if the occupation be unconnected with the service it will confer a settlement, but if it be necessarily connected with the service it shall not confer a settlement. Now, from this case, I collect that the occupation of the house was necessary for the performance of the service; therefore it must be taken as the occupation of the master and not of the servant." In *The King* v. *Stubbs* (4) the overseer, it is true, was a servant, but he rented a house entirely independent of his service. If the occupation be connected with the service, and a part payment of it, then there is no independent occupation, and it is that of the master: *The King* v. *Cheshunt.* (5) The cases decided as to 10*l.* occupiers are analogous, and in them the same distinction is drawn: *Clarke* v. *St. Mary, Bury St. Edmund's.* (6) So, again, in *Brown's case* (7) with reference to burglary, under an occupation under circumstances very similar to the present, the house was held to remain the master's.

*Denman, Q.C.*, and *Staveley Hill*, being called upon to continue the argument for the respondents. In *Hughes* v. *Chatham* (8), Tindal, C. J., says, "There is no inconsistency in the relation of master and servant with that of landlord and tenant. A master may pay his servant by conferring on him an interest in real property, either in fee, for years, at will, or for any other estate or interest; and if he do so, the servant becomes entitled to the legal incidents of the estate as much as if it were purchased for any other consideration." *Bertie* v. *Beaumont* (1) recognises the distinction as

(1) 16 East, 33.
(2) 5 M. & S., at p. 133.
(3) 3 M. & S. 276.
(4) 2 T. R. 395.
(5) 1 B. & Ald. 473.
(6) 1 C. B. (N. S.) 23; 26 L. J. (C. P.) 12.
(7) 2 East, P. C. 501.
(8) 5 M. & G., at p. 78.

to whether the occupation is unconnected or not with the service. The statute of Eliz. distinguishes between "occupiers" and "substantial householders," and therefore a man may be a substantial householder, and yet not be strictly a tenant so as to have an entirely independent occupation.

COCKBURN, C.J. With reference to the last point which Mr. Staveley Hill has urged upon us, I must say I think a man cannot be a householder within the true construction of the statute who has not an independent occupation. I do not think a man who occupies as servant, in which case the occupation is that of the master, can be said to be a householder in the proper sense of that term. But when we come to the question whether, upon the facts found by the sessions, we can say there was here the relation of landlord and tenant between the parties, or whether the occupation was simply the occupation of a servant, I think the facts are not sufficiently found, the most essential element in the consideration of that question being omitted, namely, whether this occupation was an occupation for the purpose of the service or not—whether it was necessary to the service or not. If the occupation of the servant be necessary to the service, then I think his occupation is the occupation of the master, although the remuneration which the servant receives is the less on account of his having the advantage of premises or a house of the master for the purpose of his habitation. On the other hand, if the occupation be not necessary to the service, then the fact, that the advantage of the occupation is part of the remuneration for the service, will not render that occupation less an occupation qua tenant, than it would have been if the man had paid rent. It may be that it happens to be convenient both to the master and to the servant, that the servant requiring some place of habitation shall, by agreement with the master, instead of receiving so much for his wages, out of which wages he would have to find himself a separate habitation, inhabit some premises of the master as part of the remuneration for his services; but it is only an equivalent for wages. He would be receiving in the one instance the whole amount of his wages, out of those wages he would have to find himself a habitation, for which he would have to pay rent; in the

1865

THE QUEEN v. SPURRELL.

other he inhabits premises of his master, and instead of paying the master the rent the master deducts it from the wages.

Although, therefore, the relation of master and servant happens to exist between the parties by a subordinate arrangement, and the servant occupies premises of the master rent free, as part of the wages that he would otherwise receive if he paid the rent, it does not follow, from the relation of master and servant happening to exist between the parties, that the occupation may not be an occupation qua tenant, independent of the master. As I said before, the essential element in the determination of the question is, whether or not the servant simply occupies as part remuneration for his services, or whether the occupation is subservient to and necessary to the service. That is a question of fact that might very easily be ascertained by obtaining, from the parties concerned, evidence as to the terms on which the occupation of these particular premises takes place. It is a most essential matter that the sessions have either not inquired into, or having inquired into have not thought it essential to state; but it is essential we should have that before us.

Probably with the expression of opinion that has fallen from the Court, the sessions would have no difficulty in dealing with the case, when they have ascertained that preliminary and important fact. But all I can now say is, that we cannot with satisfaction to ourselves decide the question submitted to us in the absence of what seems to us a very essential and important ingredient for determining it.

MELLOR, SHEE, and LUSH, JJ., concurred.

*Case remitted accordingly.*

WOOD AND OTHERS *v.* DUNN.

1865
Nov. 17.

*Debtor and Creditor—Payment under garnishee order under Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 63—*Trustees under Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134), *ss.* 192 & 197.

An order under s. 63 of the Common Law Procedure Act, 1854, does not protect the garnishee and justify him in paying the amount to the judgment creditor in all events.

Therefore it is no answer to an action by trustees of a deed under s. 192 of the Bankruptcy Act, 1861, for a debt due to the debtor, that the defendant, to avoid execution under a garnishee order, has paid the debt to the judgment creditor, in obedience to the order, after registration of the deed and with notice of it.

*Semble*, that the payment would have afforded no defence if made without notice.

FIRST count: that the plaintiffs ("trustees on behalf of the creditors of Randal Stap, a debtor, under a deed made between Stap and certain of his creditors and the plaintiffs as trustees, relating to the debts and liabilities of Stap and his release therefrom, according to the clauses of the Bankruptcy Act, 1861, relating to trust deeds for the benefit of creditors, and under which deed, all things necessary in that behalf having happened and been done, all the property comprised in the deed, including the present causes of action, were and are vested in the plaintiffs as such trustees") sue the defendant, as clerk to the local board of health for the district of the township of Darlington, for a balance due to Stap for work done by him under a special contract by deed between him and the local board.

The declaration also contained the common counts for work done and materials provided by R. Stap before the making of the deed, and for money paid by R. Stap before the making of the deed for the local board, and for money found to be due from the local board to R. Stap upon accounts stated between the local board and R. Stap before the making of the deed.

Plea, to the first count, as to 171*l.* 12*s.* 8*d.* parcel, &c., that three joint creditors of R. Stap had obtained two judgments in the Queen's Bench for 67*l.* 4*s.* 6*d.* and 104*l.* 8*s.* 2*d.* respectively, and obtained garnishee orders under the Common Law Procedure Act, 1854, on the judgments, on the 25th and 27th of August, 1864, respectively. "And afterwards and *before the defendant or the local board*

1865

WOOD v. DUNN.

*had any notice or knowledge of the trust deed for the benefit of the creditors of R. Stap, and before the registration of the same under the clauses of the Bankruptcy Act*, 1861, *the orders were respectively served on the defendant and the local board*, that is to say, the first-mentioned order on the 26th of August, 1864, and the second-mentioned order on the 29th of August, 1864. And the local board, not knowing of any cause to shew why they should not pay the two sums of 67*l.* 4*s.* 6*d.* and 104*l.* 8*s.* 2*d.*, or either of them, to the judgment creditors, and not knowing of the trust deed, or that the causes of action in the declaration mentioned had been assigned, did not, nor did their attorneys or agents, appear before the judge, upon either of the orders or the summons to attend therein contained, and thereupon by two other orders, bearing date respectively the 2nd and the 7th of September, 1864, the judge ordered that the local board of health should forthwith pay to the judgment creditors the debts due from the local board to R. Stap, or so much thereof as was sufficient to pay the respective judgment debts of 67*l.* 4*s.* 6*d.* and 104*l.* 8*s.* 2*d.*, and that in default thereof execution might issue for the same; each of which last-mentioned orders was thereupon, to wit, on the 13th of September, 1864, *and before the defendant or the local board of health had any notice or knowledge of the trust deed*, served upon the defendant and the local board, and payment of the judgment debts amounting together to the sum of 171*l.* 12*s.* 8*d.* was demanded under the orders by the judgment creditors; and the local board, in compliance with the orders, and in order to avoid execution for the same being levied on their goods and chattels, and because they could not otherwise have avoided such execution for the sums so ordered to be paid, paid the same to the judgment creditors, and were thereby discharged from all claims of R. Stap, and of the plaintiffs as such trustees, in respect of the said sum of 171*l.* 12*s.* 8*d.*"

The defendant pleaded a similar plea to the common counts.

Replication, that the deed, in the declaration mentioned to have been made between R. Stap and his creditors, was registered according to the provisions of the Bankruptcy Act, 1861, before payment by the local board to the judgment creditors.

Demurrer to the replication, and joinder.

1865

WOOD v. DUNN.

*Rew* in support of the demurrer. The defendant is entitled to judgment. The pleas shew that the local board paid the money to avoid execution issuing.

[MELLOR, J. In order to make the pleas a good answer, it ought to have been stated that the money was paid to the judgment creditors under the garnishee order before the deed was registered.]

It is immaterial whether the money was paid before or after registration if it was paid to avoid execution issuing. The local board were under compulsion of law to pay the money, therefore they are within the protection of the garnishee clauses of the Common Law Procedure Act, 1854.

[MELLOR, J. Assuming that they had been expressly warned that the deed had been registered and that they were not to pay the money pursuant to the garnishee order, would the payment have been good? Must we not on this plea take it that the board had notice of the deed and its registration? The cases of *Holmes* v. *Tutton* (1) and *Tilbury* v. *Brown* (2) are authorities against the defendant.]

Those cases shew that registration of a trust deed by the judgment debtor may avoid the order as against the judgment creditor, but not as against the person on whom the order for payment is made. Under section 65 of the Common Law Procedure Act, 1854, payment made by an execution levied upon the garnishee is a valid discharge to him as against the judgment debtor, although the proceedings may be set aside or the judgment reversed. The present plaintiffs have their remedy against the judgment creditors, they have received the money, and they can be sued; if the plaintiffs are entitled to the money it can be recovered from them.

[MELLOR, J. No. The garnishee has paid the money of his own wrong. He ought to have taken steps to have the execution stayed.]

*Notley* v. *Buck* (3) seems to shew that an action will lie against the judgment creditor if the money has been paid over to him.

[LUSH, J. Suppose the case of an adjudication of bankruptcy,

(1) 5 E. & B. 56; 24 L. J. (Q. B.) 346.
(2) 30 L. J. (Q. B.) 46. (3) 8 B. & C. 164.

1865

WOOD v. DUNN.

would the payment be good? The present case stands precisely on the same footing.]

By analogy to the practice of foreign attachment in the lord mayor's court, the burden of seeing that the order is correct is on the judgment creditor; the garnishee is ordered to pay the money, and as long as he obeys the order he ought to be protected. Here he paid the money not only in obedience to the order but to avert an execution. In *Westoby* v. *Day* (1) the Court held in the absence of fraud that an objection to the jurisdiction came too late, after the garnishee had paid the debt to the judgment creditor under a regular judgment.

[LUSH, J. I think it will be found that in order to make a plea of payment under an attachment in the lord mayor's court a good plea, it ought to shew that execution has been executed. (2)]

*Warton* contrà (*Barnard* with him), was not called upon, but he referred to section 184 of the 12 & 13 Vict. c. 106, and to *Symons* v. *George*. (3)

MELLOR, J. The defendant's counsel has said everything that can be said in support of his view, but we are all agreed that our judgment must be for the plaintiffs. The facts, as they appear on the pleadings, seem to be these. The local board of health being indebted to the judgment debtor in a sum of money, the judgment creditors obtain the usual garnishee order; between the garnishee order *nisi*, and the order absolute, all things appear to have been completed to constitute the plaintiffs trustees of a deed duly registered under the Bankruptcy Act, 1861. The defendant avers that the order absolute was made and served on the local board, and when it was made and served on them the local board had no notice of the trust deed, but he omits to aver that when the money was paid the local board had no such notice. Now, if there be any real distinction, between a payment with notice and a payment without notice, the plea would be bad, because it does not go on to aver that the payment was made without notice of the deed. But what we must take on the face of the pleadings is that the money was paid

(1) 2 E. & B. 620; 22 L. J. (Q. B.) 418.
(2) See *Magrath* v. *Hardy*, 4 Bing. N. C. 782.
(3) 33 L. J. (Ex.) 231; 3 H. & C. 68.

not only after notice of the deed but after registration. I have come to the conclusion that when the deed is registered under section 192, by the effect of section 197 (the words of which are wide enough to shew that the trustees under a deed contemplated by the act, all the conditions of which have been complied with, including registration, are in the same position as assignees under a bankruptcy), all the incidents which flow from an adjudication of bankruptcy must flow from the registration of the deed. Therefore payment being made after the registration of the deed, it is not sufficient to say that it was made to avoid an execution under the garnishee order. I do not think the defendant's counsel established, that the order absolute became an order binding personally on the garnishee, to pay at all events: having money in his hands which ought to be paid over to the judgment debtor who was his creditor, he is simply substituted for the judgment debtor. A garnishee will not suffer more inconvenience than this:—if an execution issues, he will be obliged to apply to a judge at chambers to stay it, and in this case the local board would perhaps have been successful in getting execution stayed; but the hardship, if there is one, from the nature of the case it is impossible to avoid. I do not see that there is any greater hardship than ordinarily happens in cases of bankruptcy. We must give effect to the provisions of the Bankruptcy Act, and they operate on the order absolute just as in the case of an order *nisi*. Giving effect to the principle of the two decisions that have been referred to, *Holmes* v. *Tutton* (1), *Tilbury* v. *Brown* (2), I think we cannot do otherwise than say that the plea is bad, and is no answer to the claim of the plaintiffs.

SHEE, J. I am of the same opinion. This action is brought on a cause of action which Randal Stap formerly had, and which is vested in the plaintiffs under a trust deed executed by him. To the declaration, the defendant in effect pleads, that the local board have paid under the garnishee order the debt which was originally due to Stap; and the plea alleges that when the local board received the order attaching the debts in their hands, and when they received the order for payment, they had no notice of the trust deed; but it does not go on to say that they had no

(1) 5 E. & B. 65; 24 L. J. (Q. B.) 346. (2) 30 L. J. (Q. B.) 46.

1865

WOOD v. DUNN.

notice, before the payment, of the fact of the deed having been registered. In that state of things the first question is, whether that plea is good. It does not present a complete defence to the action, because it does not state that the local board had not notice at the time that they paid the money. But independently of that, I am disposed to think that, on looking at the general scope and object of the Bankruptcy Act, 1861, and the construction which many of its clauses bear, the effect of the statute is to place the debtor and his trustees for the benefit of creditors, subject to such exceptions as it provides for, precisely in the position of a bankrupt and his assignees; and inasmuch as, if a bankruptcy had occurred before the payment of the money, the order would have been inoperative, so likewise, in this case, the title of the trustees being complete by the registration of the deed before the payment of the money, the order would be inoperative, and no protection afforded to the garnishee, even although he had no notice. It appears clearly from the cases which have been referred to in the argument, that bankruptcy intervening before the actual payment would have that effect. The first case is the case of *Holmes* v. *Tutton* (1), in which it was decided that from the time of the service of the order attaching the debts due to the judgment creditor, it binds the attached debts in the hands of the garnishee, but subject to the operation of the Bankrupt Law Consolidation Act, 1849, which act is part of the act of 1861, and incorporated with it, and, therefore, if the judgment debtor becomes bankrupt before the debt is paid under the order, the debt passes to the assignees and the attachment fails. It was decided in *Tilbury* v. *Brown* (2), that the bankruptcy of the judgment debtor after an order for payment served on a garnishee, but before actual payment, in effect discharges the order. That having been decided in those two cases as respects bankruptcy and assignees in bankruptcy, we have to look at the effect of the 197th section of the last Bankruptcy Act, which section provides that, after registration, "the existing or future trustees of any such deed or instrument, and the creditors under the same, shall, as between themselves respectively, and as between themselves and the debtor, and against third persons, have the same powers, rights,

(1) 5 E. & B. 65; 24 L. J. (Q. B.) 346. (2) 30 L. J. (Q. B.) 46.

and remedies, with respect to the debtor and his estate and effects, and the collection and recovery of the same as are possessed or may be used or exercised by assignees or creditors with respect to the bankrupt or his acts, estate, or effects, in bankruptcy." That makes the cases which have been decided as to the effect of bankruptcy authorities in the case before us; and it seems to me upon that ground, as well as on the want of any allegation, that the local board had no notice of the registration of the deed at the time of payment, that the plea is bad, and our judgment must be for the plaintiffs.

LUSH, J. I am of the same opinion. The plea, in my judgment, is bad, because it does not shew what it professes to shew, a legal obligation on the part of the local board to pay to a third person the money which they admit to have been due to the assignor of the plaintiffs. It has been held, and must be taken as settled law, that if the bankruptcy of the judgment debtor intervenes at any time before the garnishee has paid over the money, the attachment must lapse, and the judgment creditor must come in with the other creditors and take his share of the assets. By the 197th section of the Bankruptcy Act, 1861, the registration of a deed for the benefit of creditors is equivalent to a bankruptcy, and the trustees have all the rights of creditors' assignees in bankruptcy. The plea to be a good plea, in my judgment, ought to shew that the payment was made under the garnishee order prior to the registration of the deed, that is, before that which is equivalent to a bankruptcy. It has been contended that payment after the registration of the deed, but without notice of it, would be good. As at present advised, I cannot assent to that proposition; but even if it could be supported, the plea would be equally bad, because it does not allege that the payment was made without notice of the registration. Upon these grounds it appears to me that the plea is bad, and that our judgment must be for the plaintiffs.

*Judgment for the plaintiffs.*

1865
*Nov.* 11.

THE WAKEFIELD LOCAL BOARD OF HEALTH, APPELLANTS.
THE WEST RIDING AND GRIMSBY RAILWAY COMPANY } RESPONDENTS.

*Railway Clauses Consolidation Act* (8 *Vict. c.* 20), *s.* 3—"*Justice*"—*Jurisdiction, want of, on ground of interest.*

The Railway Clauses Consolidation Act (8 Vict. c. 20), s. 3, enacts that "justice" shall mean "a justice acting for the county, &c., in which the matter requiring the cognizance of such justice shall arise, and who shall not be interested in the matter":—

*Held*, that the latter part of the definition is merely declaratory of the common law, and does not confine the jurisdiction given by different sections of the act to a justice of the county, &c., not being interested; and, therefore, where, on the hearing of a complaint under section 58, an objection to a justice on the ground of interest is waived by the parties, the justice has jurisdiction, and the objection of want of jurisdiction cannot afterwards be raised.

CASE stated under 20 & 21 Vict. c. 43, by justices of the West Riding of Yorkshire.

The railway of the respondents is partly situate in the appellants' district, and in the course of making it certain roads of which the appellants are surveyors had been used and interfered with by the respondents, within the meaning of section 58 of the Railway Clauses Consolidation Act, 8 Vict. c. 20. Accordingly, on the 13th of January, 1864, the appellants laid an information before a justice of the West Riding, and he granted a summons, which was heard on the 11th of February, 1864, before Colonel Smyth and another justice of the Riding. At the hearing on the 11th of February, 1864, it was objected by the now respondents (*inter alia*) that Colonel Smyth was interested in the matter, as being a proprietor in the Aire and Calder Navigation Company, and consequently a ratepayer in the appellants' district. But this and other objections were subsequently abandoned at the hearing by the now respondents. The justices made an order upon the now respondents, to do repairs to certain roads; and at the instance of the now respondents they granted a case for the opinion of the Court of Queen's, Bench upon another point, and, after argument, this order was affirmed by the court, upon the one point submitted to them (1).

An information having been laid under sect. 145, of 8 Vict. c. 20,

(1) See *West Riding and Grimsby Railway Company* v. *Wakefield Local Board*, 33 L. J. (M. C.) 174.

against the respondents for not obeying the order, it was proved on the hearing that the respondents had not put the roads into repair.

The respondents objected (*inter alia*) that the order was void for want of jurisdiction in Colonel Smyth, one of the justices who made the order, as being interested within the meaning of the 8 Vict. c. 20, s. 3.

The appellants contended, in answer to this objection, that all the objections having been abandoned at the hearing on the 11th of February, 1864, except the one which the court of Queen's Bench afterwards determined to be invalid, the present objection could not now be set up.

The justices dismissed the information, on the ground amongst others, that the above objection was fatal.

The question for the court was whether the order of the 11th of February, 1864, was valid.

*Cleasby, Q.C.* (*Maule* with him) for the appellants. The respondents at the hearing at which the order was made, knowing the justice was interested, distinctly abandoned the objection, and they cannot again raise it; unless the jurisdiction given by section 58 of the 8 Vict. c. 20 to "two justices" to order the repairs to be done, is restricted by the definition given in section 3, of the word "justice," which that section says "shall mean justice of the peace acting for the county, borough . . . . or place, where the matter requiring the cognizance of any such justice shall arise, *and who shall not be interested in the matter.*" The contention of the respondents is that this gives jurisdiction only to an uninterested justice, and that an interested justice is not a "justice" within the 58th and other sections of the act. But this is a fallacy, the latter words of the definition are only added *ex abundanti cautelâ* to warn parties calling in the aid of justices that, by the common law, a justice having jurisdiction becomes incapable of acting as a justice if interested in the subject-matter.

*S. Temple Q.C.* (*Horace Lloyd* with him) contrà. The jurisdiction which was exercised in making the original order is a jurisdiction conferred by the 8 Vict. c. 20 s. 58: and reading that section with section 3, it runs, that the question of damage done to a road "shall be referred to the determination of two justices who

1865

WAKEFIELD LOCAL BOARD OF HEALTH v. WEST RIDING AND GRIMSBY RAILWAY COMPANY.

are not interested in the matter." In the present case, therefore, one of the justices being interested, he was not a justice to whom jurisdiction was given, and there being no jurisdiction it could not be given by consent; and advantage of this want of jurisdiction may be taken at any time: *Rex* v. *Chilverscoton.* (1)

*Cleasby* in reply, pointed out that inasmuch as jurisdiction must appear on the face of the order of a justice of the peace, it would follow, if the respondents' contention were correct, that every single order made under the act was void for not averring that the justices making it were not interested.

COCKBURN, C.J. I am opinion that the objection raised by the respondents was untenable. I think the words inserted at the end of the definition in the interpretation clause, section 3 of the 8 Vict. c. 20, were inserted, as Mr. Cleasby argues, from excess of caution, in the apprehension that justices, if not warned of what the law is, might act although interested; and the legislature thought that, if they did not actually include what would be virtually implied, it might be assumed that it was excluded. I cannot think that it was intended to make interest an absolute disqualification. Had it been intended to confine jurisdiction to a non-interested justice, and to render an interested justice absolutely incompetent, notwithstanding both parties might consent and intend to waive the objection, a positive enactment to this effect would have been inserted. To read this definition in the way Mr. Temple contends for, would produce the absurdity that a justice by virtue of his commission, if he became interested, would cease to be a justice; that never could have been intended. I am therefore of opinion that, although Colonel Smyth may have been interested so as to incapacitate him from acting, yet, as the parties were aware of the objection and waived it, he had jurisdiction to make the order; and nothing is clearer than that having thus waived the objection of interest, and taking the chance of a decision in their favour, the parties cannot afterwards raise it.

LUSH, J., concurred.

*Case remitted accordingly.*

(1) 8 T. R. 178.

SAUNDERS, Appellant, BALDY, Respondent.

1865
*Nov.* 11.

*Game*—1 & 2 *Will.* 4, *c.* 32, *ss.* 3 & 23—*Taking game out of season without a certificate.*

The 1 & 2 Will. 4, c. 32, s. 3, forbids, under penalties, the killing or taking certain game during certain intervals of the year; and section 23 imposes penalties on any person taking or killing game, or using a dog or engine for that purpose, not being authorized for want of a certificate:—

*Held*, that a person using an engine for taking game without a certificate during the forbidden interval, was liable to penalties under the latter section, although he might also be liable to penalties under section 3.

Case stated by justices under 20 & 21 Vict. cap. 43.

An information was laid by the appellant against the respondent under the 1 & 2 Wm. 4, cap. 32, s. 23, charging that the respondent did on the 13th of March, 1865, at &c., unlawfully use a certain trap for the purpose of taking game, he not having a game certificate.

The respondent had no certificate, and evidence was given which satisfied the justices that a trap had been set by him to catch partridges or pheasants on the day named in the information; but they intimated that they did not consider that the information could be sustained, on the ground that even if the respondent had a game certificate, he would not be authorized to take either partridges or pheasants at the time the offence charged in the information was alleged to have been committed.

It was contended on the part of the appellant, that any uncertificated person, who killed partridges or pheasants at this period of the year, would be liable to two penalties, viz.: one for killing game out of season, and the other for killing game without a game certificate; and as regards the latter penalty, that a person would be equally liable to it for using an instrument to take or kill game without such certificate, and that no person had any right to kill game at any time without a game certificate; and, therefore, whether game was in or out of season, such person would be liable to the penalty for killing game without a certificate.

The justices were of opinion that, inasmuch as under section 3

1865

SAUNDERS v. BALDY.

of 1 & 2 Wm. 4, c. 32, all persons are prohibited from killing or taking partridges or pheasants between the 1st of February and the 1st of September, and the 1st of February and the 1st of October, respectively, and that no certificate would authorize such persons to take or kill game of that kind between such periods, the respondent could not be said not to be authorized for want of a game certificate, and, therefore, could not be legally convicted upon an information which charged him with using an instrument for the purpose of taking game without a certificate, when no game certificate which he could by any possibility have obtained, would have authorized him to take or kill game at the time when the offence in question was alleged to have been committed; and they accordingly dismissed the information.

The question for the court was whether upon the facts the information was rightly laid, and the respondent liable to the penalty imposed by 1 & 2 Wm. 4, cap. 32, s. 23 (1).

*Hannen,* for the appellant. It may be observed that the second branch of section 3 of the 1 & 2 Wm. 4, cap. 32, only imposes penalties on the killing or taking game out of season, and not on the mere using an instrument for the purpose, so that the respondent in the present case could not have been convicted under this section. But the true answer to the justices' conclusion is, that section 23 has quite a different object, and makes it illegal to attempt to take game without a certificate, wholly irrespective

(1) The 1 & 2 Wm. 4, c. 32, s. 3, enacts, "That if any person shall kill or take any game, or use any dogs, gun, net, or other engine or instrument for the purpose of killing or taking game on a Sunday, or Christmas Day, he shall, on conviction, forfeit for every such offence a sum not exceeding 5*l.*; and if any person shall kill or take any partridge between the 1st of February and the 1st of September in any year, or any pheasant between the 1st of February and the 1st of October in any year .... he shall forfeit and pay, on conviction, for every head of game so killed or taken a sum not exceeding 1*l.*"

Section 23 enacts, "That if any person shall kill or take any game, or use any dog, gun, net, or other engine or instrument, for the purpose of searching for, or killing or taking game, not being authorized so to do for want of a certificate, he shall on conviction forfeit for every such offence a sum not exceeding 5*l.* Provided that no person so convicted shall by reason thereof be exempted from any penalty or liability under any statute relating to game certificates, but that the penalty imposed by this act shall be deemed to be a cumulative penalty."

of the time of year. It is a fallacy for the justices to say a certificate would not have authorized the respondent to take game at this particular season, it is a personal license without any reference to the season; and a certificate granted under 23 & 24 Vict. c. 90, extends to the 5th of April, so that had the respondent had one, he would, as far as the certificate is concerned, have been authorized to kill game.

The respondent did not appear.

COCKBURN, C.J. I am of opinion that the justices ought to have convicted the respondent. I see no reason why a man should not be liable to two penalties for the two offences—one against the laws for preservation of game, and one against the revenue, no matter at what season of the year. I think the respondent was guilty of the offence charged, inasmuch as he used an engine for the purpose of killing game without a certificate.

LUSH, J. I am of the same opinion. The penalties in the two sections are cumulative.

*Case remitted accordingly.*

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HAWKINS AND ANOTHER, *v.* CARR.
PARSONS AND ANOTHER, *v.* CARR.

*Nov.* 13.

*Practice—Interrogatories—Common Law Procedure Act,* 1854 (17 & 18 *Vict.* c. 125) *s.* 51 — *Action by surviving partners or executors—Plea, settlement with deceased.*

To an action by surviving partners, for goods sold, money lent to, and on accounts stated with the defendant, by them and their late partner, the defendant pleaded a settlement of the account between him and the deceased by a bill not yet due.

The Court, in conformity with the practice in Chancery, allowed interrogatories to be put to the defendant as to the circumstances of the alleged settlement.

The Court allowed similar interrogatories in a similar action by the executors of a deceased person, in which a similar plea had been pleaded.

IN each of these cases a rule had been obtained calling on the plaintiffs to shew cause why an order of Blackburn, J., allowing certain interrogatories, should not be set aside.

The first action was brought by the plaintiffs, as surviving partners of one John Parsons, deceased; and the declaration con-

1865

HAWKINS v. CARR. PARSONS v. CARR.

tained the common counts for goods sold and delivered by the plaintiffs and Parsons in his lifetime to the defendant, for work done and materials provided by the plaintiffs and Parsons in his lifetime for the defendant; for money paid by the plaintiffs and Parsons in his lifetime for the defendant; and for money found to be due from the defendant to the plaintiffs and Parsons in his lifetime, upon accounts stated between them in the lifetime of Parsons. There was also a count for money found to be due from the defendant to the plaintiffs as such surviving partners of Parsons, upon accounts stated between the plaintiffs, as such surviving partners, and the defendant, since the death of Parsons.

Pleas. 1. Never indebted, to the whole declaration. 2. As to so much of the plaintiff's claim as is alleged to have accrued in the lifetime of Parsons, that that claim consisted of items of claim which were *bonâ fide* disputed by the defendant to be due to Parsons and the plaintiffs, and items of an unliquidated, unascertained, and unknown amount, which, unless ascertained by the parties themselves, would be wholly uncertain till assessed by the verdict of a jury; that Parsons made another claim against the defendant, which consisted (like the other claim) of disputed and unliquidated items; that the defendant and Parsons, in pursuance of a previous agreement between them to that effect, jointly ascertained which of the disputed items of both claims, were or were not due, and jointly ascertained the unliquidated amounts of the items of both claims; and fixed 55*l.* 18*s.* 3*d.*, as the whole amount due from the defendant in respect of the claim to which this plea is pleaded and of Parsons' other claim; and the defendant thereupon accepted and delivered to Parsons for the said amount a bill of exchange, drawn by Parsons upon the defendant, for the payment to Parsons of 55*l.* 18*s.* 3*d.*, two years after date; and that Parsons accepted the defendant's performance of the agreement in full satisfaction and discharge of the claim to which this plea is pleaded, and of Parson's other claim in respect of every sum beyond the sum for which the bill was delivered. That the accounts alleged in the declaration were stated as mentioned in the plea; and no accounts were stated except as aforesaid. That afterwards, and before the bill was due, and while Parsons was holder of it, the defendant (in pursuance of an agreement to that

effect between him and Parsons) paid to Parsons 30*l.*, parcel of the amount of the bill, and accepted and delivered to Parsons, for the residue of the bill, a second bill of exchange, drawn by Parsons, upon the defendant, for the payment by the defendant to Parsons, of 25*l.* 18*s.* 3*d.*, three years after date; and Parsons then discharged the defendant from all liability on the first bill, and delivered it up to the defendant; that the second bill has not yet become due, nor have the three years from its date yet elapsed.

The interrogatories allowed to be put to the defendant were as follows:—

1. When, where, and at what place, and at what time and hour of the day, did you and Parsons, if at all, or if ever, meet to ascertain, settle, and assess the respective amounts of the claims and demands mentioned in your plea?

2. At the time of the alleged adjustment or settlement of the accounts respectively mentioned by you in your plea, state what particulars or bills of account were before you and Parsons, and whether or not the items of claims mentioned and comprised in the particulars of demand in this action, and the particulars of demand in the action of Parsons and another, executors of J. Parsons, deceased, against you were before you and Parsons, and the subject of discussion and adjustment. If these items were not, then state what items, claims, and accounts were. What was the whole and joint amount allowed by Parsons, if at all, in your favour, upon the two accounts?

3. Was or was not the bill of exchange for 55*l.* 18*s.* 3*d.* mentioned by you in your plea, given and accepted by you upon, for, and on another and different account and demand than that mentioned by you in your plea; and, if so, on what other account, or in respect of what other demand?

4. Was not that bill accepted by you and handed to Parsons for money lent and advanced by him to you? and when was this, and what was the amount of the advance, and the discount allowed on such advance? Who procured, purchased, or paid for the stamp on the bill; and what has become of this bill?

5. When, and where, and under what circumstances, and for what account or consideration, and why did you pay, as you have alleged in your plea, 30*l.* to Parsons, and deliver to him the bill

1865

HAWKINS v. CARR. PARSONS v. CARR.

for 25*l.* 18*s.* 3*d.*, payable three years after date? State and set forth the particular place and time where you paid such sum and gave such bill, and the reasons and circumstances for paying such sum, and giving such bill to Parsons, and why you paid the 30*l.*, during the currency of the first bill; and why so long a period as three years was chosen for the payment of the next bill of exchange.

6. Was not the sum of 30*l.* paid by you, and where, on account of a different transaction than that mentioned by you in the plea? State fully on what account that sum was paid by you to Parsons.

7. Did you ever draw, accept, or deliver the bill for 35*l.* 18*s.* 3*d.* to Parsons, as you have alleged in you plea? and if so, state when.

The second action was by the plaintiffs, as surviving executors of the same John Parsons; the declaration and pleas, and the interrogatories allowed, were precisely similar to the above, *mutatis mutandis.*

*R. A. Fisher* (Nov. 9) shewed cause. By s. 51 of the Common Law Procedure Act, 1854, the power to put interrogatories is placed on the same footing as the examination of witnesses, with the limitation that they must be confined to those matters as to which a bill of discovery may be sought. The interrogatories allowed apply to the plaintiffs' case as well as to the defendant's, and would be allowed by the practice in Chancery; and in similar cases similar interrogatories have been allowed in the courts of law: *Whateley* v. *Crowter* (1), *Moor* v. *Roberts* (2), *Bayley* v. *Griffiths* (3), *Rew* v. *Hutchins* (4), *Zychlinski* v. *Maltby.* (5)

*Barnard,* in support of the rules. These interrogatories are directed exclusively to the defendant's case. They amount simply to calling upon the defendant to swear to the truth of the allegations in his plea. No case cited goes so far as the present; nor would the interrogatories be allowed by the practice in Chancery.

(1) 5 E. & B. 709; 25 L. J. (Q. B.) 163, nom. Whateley *v.* Crawford.

(2) 2 C. B. (N. S.) 671; 26 L. J. (C. P.) 246.

(3) 1 H. & C. 429; 31 L. J. (Ex.) 477.

(4) 10 C. B. (N. S.) 829.

(5) 10 C. B. (N. S.) 838.

1865

HAWKINS v. CARR. PARSONS v. CARR.

COCKBURN, C.J. This is a very important case, not in itself, but as involving general principles. It is, therefore, desirable before laying down any general rule that we should look into the matter, and consult the judges of the other courts.

*Cur. adv. vult.*

NOV. 13. The judgment of the Court (Cockburn, C.J., and Mellor, Shee, and Lush, JJ.), was delivered by

LUSH, J., who said, after stating shortly the nature of the case, and of the interrogatories: We had doubts whether the interrogatories were such as were contemplated by the statute or consistent with the practice in Chancery; and we took time to consider, in order to ascertain this latter point, and to consult the other judges in the matter. We have now done so, and we understand that in a case of this particular nature the interrogatories would be allowed; and, therefore, as we are by no means desirous to curtail the powers conferred upon the courts of law by the Common Law Procedure Act, 1854, we think that the interrogatories ought to be allowed, and the rules will, therefore, be discharged.

*Rules discharged without costs.*

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THE QUEEN on the prosecution of ROSENTHAL AND TAYLOR, APPELLANTS, v. STRUGNELL, RESPONDENT.

*Nov.* 28.

*Theatre—Performance of stage plays in unlicensed place—6 & 7 Vict. c. 68, s. 2.*

A person who hires an unlicensed public room for six nights, and publicly performs stage plays in it, is not liable to be convicted under section 2 of the 6 & 7 Vict. c. 68, for "having and keeping" a place of public resort for the public performance of stage plays without a license.

ON appeal to the quarter sessions of the borough of Grantham, against a conviction of the appellants, the recorder quashed the conviction, subject to the following case:

The conviction charged that the appellants on the 31st of January, and on the 1st, 2nd, and 3rd of February, 1865, "did have and keep a certain public room in the Exchange Hall in the said borough, for the public performance of stage plays, without

1865

THE QUEEN v. STRUGNELL.

authority by virtue of letters patent, or license from four justices of the borough," and adjudged them to pay 2*s.* 6*d.* for each offence, &c.

The appellants, Edmund Rosenthal and Marian Taylor, in the month of January, 1865, hired a large public room in the borough of Grantham, known as the Exchange Hall, for the public performance of stage plays. They paid to the secretary of the Exchange Hall, 7*l.* for the use of the room for six consecutive nights, commencing on the 30th of January. The room was not licensed for the performance of stage plays by virtue of letters patent, or license from four justices of the borough, or otherwise. The appellants caused to be issued and published play-bills, announcing that on the several nights mentioned in the conviction, certain stage plays would be performed, and such stage plays were accordingly publicly performed by the appellants and other persons on the several days mentioned. The appellant Taylor received at the door of the entrance of the room money from the public who attended to witness the stage plays.

On the part of the respondent it was argued that the appellants "had or kept a house or other place of public resort, for the public performance of stage plays without authority by virtue of letters patent or without license," within the intent and meaning of section 2 of the 6 & 7 Vict. c. 68; but no case or authority was quoted in support of such argument.

On the part of the appellants it was argued that they did not "have or keep a house," or other place of public resort, for the public performance of stage plays without authority or license as aforesaid within the intent and meaning of the section; but that the owners of the Exchange Hall were the persons who so had or kept the same; and in support of such argument the case of *Davys* v. *Douglas* (1) was cited, and the 7th and 11th sections of the act were relied on.

Entertaining doubts whether the facts proved constituted a "having and keeping," within the 2nd section of the 6 & 7 Vict. c. 68, the recorder quashed the conviction, subject to the opinion of the court.

*J. W. Mellor* in support of the order of sessions. The recorder

(1) 28 L. J. (M. C.) 193; 4 H. & N. 180.

was right; the appellants were not within section 2 of the 6 & 7 Vict. c. 68, which enacts that "it shall not be lawful for any person to *have*, or *keep* any house or other place of public resort, for the public performance of stage plays, without authority by virtue of letters patent from Her Majesty, or license from the Lord Chamberlain, or from the justices as hereinafter provided." (1) That enactment clearly points at the permanent lessee or occupier of the place, and not at a person who hires it for a few nights only. Section 11 applies to the appellants' position, which enacts that "every person who, for hire, shall act, or present, or cause to present, or suffer to be acted or presented, any part in any stage play, in any place not duly licensed as a theatre, shall forfeit," &c. And section 16, as to the evidence necessary, exactly hits the present case. The 25 Geo. 2, c. 36, s. 2, which is in pari materiâ, shows that the license is to the house and not to the person.

*Mellish, Q.C.* and *Cave*, contrâ. Section 2 applies to the person who is "for the time being, the actual and responsible manager of the theatre;" for, by section 7 it is to him alone that the license is to be granted; and the appellants, who hired the room and got up the performance, come within that category. The secretary of the Exchange Hall, simply acted as landlord, in letting the rooms, and had no control over the performance: *Reg.* v. *Stannard* (2), *Shutt* v. *Lewis*. (3) It is to be observed that the fee for the license is but five shillings a month by section 6, so that there was no hardship on the appellants in being obliged to obtain the license.

MELLOR, J. I am of opinion that the recorder was right, and that the conviction by the justices proceeded upon an erroneous view of the construction and object of the act. I should regret if there were no section to enable any interference with persons like the present appellants, should they act anything of an immoral nature or otherwise misconduct themselves, and if the justices had no control over them. But section 11 seems clearly to apply to this very case, of persons who take a room or house, temporarily,

(1) By section 5 the license is to be under the hands and seals of four justices.

(2) 33 L. J. (M. C.) 61; L. & C. 349.

(3) 5 Esp. 128.

1865

THE QUEEN v. STRUGNELL.

and act or cause stage plays to be acted in it, although unlicensed. And section 2 seems to have reference to the person who has the permanent control of the room. Suppose the present appellants having the permission of the secretary to act particular plays, had given leave to some other persons, and said, you may act something else, I apprehend the secretary could have interfered with those other persons. The relation therefore of the appellants with the secretary was simply that they had the use of the room, subject to the control of the secretary, acting on behalf of the owners of the Exchange Hall, and the appellants had not such a permanent and entire control over the room as is contemplated by section 2. The justices were therefore wrong in convicting under that section.

LUSH, J. I am of the same opinion. The scheme of the act is to maintain proper control over theatrical entertainments and the acting of stage plays; and it requires a license for the place, (section 7), and inflicts penalties both on the person having permanent control over the place (section 2), and allowing stage plays in it when unlicensed, and on every person who performs or causes stage plays to be performed (section 11). Now in the present case, the persons convicted had not in any sense the permanent control of this building; but they performed, or caused to be presented, stage plays in it. And when section 11 points at this latter class of persons, I must suppose that the other section points at other and different persons, viz., persons having the permanent control of the premises. Section 2 says, "It shall not be lawful for any person *to have or keep* any house or other place of public resort for the public performance of stage plays without authority by letters patent, or license from the Lord Chamberlain, or four justices," and inflicts a penalty of 20*l.* for every day the place is kept open. It would be straining language to the very utmost to say that this would apply to any person who only pays for permission to act stage plays for a single evening, or for a succession of six evenings. When we look at the sections referring to the license, this view is confirmed. By section 7, no license is to be granted to any person except the actual and responsible manager, for the time being, of the theatre. And when the person having the full control of the theatre or house to be used as a theatre has a license,

1865

THE QUEEN v. STRUGNELL.

he can then employ, or allow any other person to perform or conduct performances in it. The license is to the house, not to the individual. And it could not be intended that a person, who has no interest in the house beyond the performance during a few nights, is to take out a license for the house. I think, therefore, the recorder was right in quashing the conviction, and the order of sessions ought to be affirmed.

*Order of Sessions affirmed.*

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EDMUNDS, P. O., *v.* BUSHELL AND JONES.

*Nov.* 4.

*Principal and agent—Liability of principal for act of agent—Bill of exchange.*

A. employed B. to manage his business, and to carry it on in the name of "B. & Co.;" the drawing and accepting bills of exchange was incidental to the carrying on of such a business, but it was stipulated between them that B. should not draw or accept bills. B. having accepted a bill in the name of "B. & Co.":—

*Held*, that A was liable on the bill in the hands of an indorsee, who took it without any knowledge of A. and B., or the business.

THIS was an action commenced under the Summary Procedure on Bills of Exchange Act, 1855 (18 & 19 Vict., c. 67). The defendant Bushell had not appeared, and judgment had been signed against him.

The declaration was against Jones, as acceptor of a bill for 184*l.*, dated 1st of February, 1865, at four months after date, drawn by one Britten to his order, and indorsed by him to Taylor, and by Taylor to the Birmingham and Midland Banking Company, of which the plaintiff was the public officer.

Plea, that the defendant Jones did not accept the bill.

The cause was tried at the last Surrey Summer Assizes, before Crompton, J., and the following facts were proved. The defendant Jones was a wholesale straw hat manufacturer, who carried on business at Luton, in Bedfordshire, and also until May, 1865, had a branch establishment in Milk Street, London. The business in London was carried on under the name of "Bushell & Co." By an agreement between the two defendants it was agreed that Bushell should enter Jones's service as manager of the establishment in London, and that he should be paid for his services quarterly an' amount

1865

EDMUNDS v. BUSHELL.

equal to one-half of the net profit to be derived from the business carried on in London. Jones opened an account in the name of "Bushell & Co.," at the London and County Bank, into which account Bushell was to pay all sums which he received to the amount of 5*l.* He had authority from Jones to draw cheques in the name of Bushell & Co. for the purposes of the business, but he had no authority to draw or accept bills. In July, 1864, Bushell accepted a bill in the name of Bushell & Co., dated 9th of April, 1864, drawn upon Bushell & Co., and made payable at the London and County Bank. This bill was paid at maturity, and Jones did not know of the transaction until he saw the amount entered in his pass-book as a payment. Jones then told Bushell he had no authority to accept bills, and forbade him to do so. Bushell, however, accepted three other bills, dated in November and December, 1864, which fell due in February and March following, and were paid at the London and County Bank, and charged to Jones. These four bills were given to persons with whom "Bushell & Co." had dealings in the way of business. In consequence of these irregularities Bushell was dismissed in May, 1865.

The acceptance to the bill sued upon was in the style of "Bushell & Co.," and was proved to be in the handwriting of Bushell. The bill was taken by the banking company from Taylor, a customer, for a good consideration, the company knowing nothing of Bushell & Co.

The jury found a verdict for the plaintiff, for 185*l.* 17*s.*, leave being reserved to move to enter a verdict for the defendant, if the Court should be of opinion that there was no reasonable evidence of the defendant Jones's liability.

*Joseph Brown, Q.C.*, moved accordingly. There is no evidence to make Jones liable. In order to make him liable, either he must have held himself out to the company as a partner, or have publicly held himself out as connected with the firm; Jones' name did not appear on the bill, nor was it shewn that the company were aware of his connection with the business, for he had never had a transaction with them. In *Young* v. *Axtell*, cited in *Waugh* v. *Carver* (1), it is said if a person suffers his name to be used in a

(1) 1 Sm. L. C. 734.

business, and holds himself out as a partner he will be certainly liable, though a creditor of the firm does not at the time of dealing know that he was a partner, or that his name was used. But this is questioned in the note (1) and *Dickenson* v. *Valpy* (2) is cited to shew that a nominal partner to be made liable must have held himself out, not to the world, for that is a loose expression, but to the creditor. The banking company did not take the bill on the faith of Jones's apparent responsibility. He is not liable unless it can be shewn that he represented himself to the banking company as a partner. In *Carter* v. *Whalley* (3) a person was held not to be liable as a partner unless the creditor had dealt with him in the character of a partner, or he had held himself out so publicly to be one as that the creditor must have known of it.

[COCKBURN, C.J. This is not a case of nominal partners: here the actual owner of the business employs Bushell in the business as his manager and ostensible principal: it is a question of agency.]

Jones never held Bushell out as a partner to the banking company, and is not bound by his acts: he has never in any way deceived the company.

COCKBURN, C.J. In this case there ought to be no rule. The defendant carried on business both at Luton and in London. In London the business was carried on in the name of Bushell & Co., Jones at the same time employing Bushell as his manager; Bushell was therefore the agent of the defendant Jones, and Jones was the principal, but he held out Bushell as the principal and owner of the business. That being so, the case falls within the well-established principle, that if a person employs another as an agent in a character which involves a particular authority, he cannot by a secret reservation divest him of that authority. It is clear, therefore, that Bushell must be taken to have had authority to do whatever was necessary as incidental to carrying on the business; and to draw and accept bills of exchange is incidental to it, and Bushell cannot be divested of the apparent authority as against third persons by a secret reservation. I think Jones was properly held to be liable on the bill.

(1) 1 Sm. L. C. 747. (2) 10 B. & C. 140.
(3) 1 B. & Ad. 11.

1865

EDMUNDS v. BUSHELL

MELLOR, J. I am of the same opinion. The case differs from those in which the question turns upon the fact whether A or B is a partner in the same firm. Here Jones puts forward Bushell as a principal, and it is in the name of Bushell & Co. that the business is carried on. It is not a question of partnership, but whether Bushell, who has been held out to everybody as a partner, has authority to bind Jones. It would be very dangerous to hold that a person who allows an agent to act as a principal in carrying on a business, and invests him with an apparent authority to enter into contracts incidental to it, could limit that authority by a secret reservation. I see no reason for disturbing the verdict.

SHEE, J. The leave reserved in this case was to enter a verdict for the defendant, if the Court should be of opinion that there was no reasonable evidence on which the jury could find for the plaintiff, and, in my opinion, there was reasonable evidence to sustain the verdict. I think we are not in any danger of disturbing the cases which relate to the law of partnership. In this case it appears that Jones carried on two distinct businesses. The business in London was carried on for his benefit, and with his sanction, in the name of Bushell & Co., and was a business in which a partner would be presumed to have authority to accept bills; and the natural inference when a person allows an agent to carry on a particular business as an ostensible principal, is that he clothes him with every authority incidental to a principal in the business.

*Rule refused.*

## HASELGROVE *v.* JOHN HOUSE.

1865
*Nov.* 10.

*Debtor and creditor—Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134), *s.* 192—*Deed of composition—Release.*

A deed of composition under section 192 of the Bankruptcy Act, 1861, (24 & 25 Vict. c. 134), between a debtor, sureties, and his creditors, contained a clause that the parties of the third part did release all actions, . . . contracts, . . . whatsoever, which the parties of the third part now have, or which they at any time hereafter may have against, J. H., by reason, or on account of any debt or debts, . . . contracts . . . from the beginning of the world to the day of the date of the deed:—

*Held*, that the release was not unreasonable, inasmuch as it must be taken to be restrained by the whole scope and object of the deed, and confined to causes of action which could be proved by a creditor in bankruptcy.

Declaration on a guarantee to recover the price of goods supplied by the plaintiff to one Richard House, and for money due on accounts stated.

Plea, that the defendant had entered into a deed of composition under the Bankruptcy Act, 1861, all the formal requirements of which act had been complied with, and that the plaintiff was a creditor within the meaning of the act, and was bound by the deed. The deed (which was set out at length) was an indenture made the 12th of April, 1865, between John House of the first part, and R. Lord and T. Robertshaw, of the second part, and all the several creditors of House of the third part. After reciting that J. House was unable to pay his creditors the full amount of their respective debts, and proposed to his creditors to pay them a composition of 5*s.* in the pound, and to secure the distribution amongst them of the sum of 160*l.*, as thereinafter mentioned, which they had agreed to accept and take upon the amount of, and in full satisfaction for their respective debts, in the manner and at the times thereinafter mentioned, the debtor covenanted for the payment of 5*s.* in the pound, by two instalments, on the 14th of April then instant, and 24th of July, then next, and the parties of the second part covenanted with the parties of the third part to distribute a sum of 160*l.* rateably, amongst all the several creditors of J. House; the deed assigned to the sureties all the property mentioned in a schedule to the deed, as a security for

1865

HASELGROVE v. HOUSE.

the repayment to them of the sum of 160*l*. Then followed a clause that "in pursuance of the recited agreement, and in consideration of the covenants hereinbefore contained, and of the premises, they, the said several persons and corporations, parties of the the third part, for and on behalf of themselves and their several and respective partners do, and each of them, and every of them doth by these presents absolutely remise, release, and for ever quit claim unto J. House, his heirs, executors, administrators, all and all manner of actions and action, suit and suits, cause and causes of action and suit, *contracts*, damages, claims, and demands, whatsoever which the parties hereto of the third part, or any or either of them, either alone or jointly with their respective partners now have, or which they, or any or either of them, or any or either of their respective partners, or the respective heirs, executors, or administrators of them, or their respective partners, at any time or times hereafter can, shall, or may have or be entitled to from, upon, or against the said John House, his heirs, executors, or administrators, by reason or on account of any debt or debts, sum or sums of money, bills, bonds, notes, securities for money, *contracts*, provisoes, agreements, reckonings, accounts, dealings, or transactions whatsoever, owing for, or made upon or entered into by the said John House to or with them, the third parties hereto of the third part respectively, either alone or jointly with their respective partners, or transacted, done, or pending by and between them respectively, from the beginning of the world to the day of the date of these presents, save and except the covenants and agreements herein contained."

Demurrer to the plea and joinder.

*Mellish*, Q.C. (*Waddy* with him), in support of the demurrer. The deed is not binding on the non-assenting creditors, because it contains a release which includes claims for damages not existing when the deed was executed. By the recital to the deed it would appear that the deed was intended to be a composition deed under the Bankruptcy Act, between a debtor and his creditors. The recital and the release are to be read together: *Payler* v. *Hommershaw* (1), and if this were done the release ought only to extend to

(1) 4 M. & S. 423.

release those debts which would be proveable under a bankruptcy. By the Bankruptcy Act, 1861, s. 153, demands in the nature of damages, though unliquidated or unascertained, are now proveable against a bankrupt's estate, but the proof is limited to damages due in respect of a breach of contract at the time of adjudication. In this case it might be morally certain that the contract would be broken, but still unless it was broken at the time of adjudication, the damages could not be proved; here the words of the release are very large, and release the defendant from every breach of contract, whether broken at the time of the registration of the deed or not; in fact, it releases every transaction between the parties. It is most unreasonable that a non-assenting creditor should be bound by such a release.

[LUSH, J. The release is contained in a deed of composition under the Bankruptcy Act, which has reference only to those who are the creditors of the debtor; a person who has entered into a contract which is not broken at the time of bankruptcy would not be a creditor.]

*Quain*, contrà, was not called upon.

COCKBURN, C.J. The argument on behalf of the plaintiffs is, that the terms of the release contain the word "contracts," which is a word which might embrace contracts not broken at the time. Now, the deed is a deed between the debtor of the first part, two sureties of the second part, and the creditors of the debtor of the third part. No one, as pointed out by my brother Lush, is a creditor, unless the contract he has entered into be already broken. Our judgment must, therefore, be for the defendant.

MELLOR, SHEE, and LUSH, JJ., concurred.

*Judgment for the defendant.*

1865
Nov. 10.

## BUVELOT *v.* MILLS.

*Debtor and Creditor—Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134), *s.* 192—*Deed of Composition—Covenant to pay Scheduled Creditors.*

2702 Ex 26 — 277

A deed of composition under section 192 of the Bankruptcy Act, 1861, between the debtor of the first part, and the several persons whose names and seals were thereunto subscribed and set, being creditors of the debtor, and all other persons being creditors of the debtor, of the other part, after reciting that the debtor was indebted to the parties of the second part, contained a covenant by the debtor with the said persons of the second part, that he would pay "unto the said persons respectively the several sums of money placed opposite to the respective names of the said persons in the third column of the schedule to the deed, being the amount of the composition agreed upon, by two instalments on certain days," and it was declared that until the debtor should make default the parties of the same part should not bring any action in respect of their several debts specified in the several columns of the schedule :—

*Held*, that the covenant as to payment and the covenant not to sue must override the generality of the earlier part of the deed, and were confined to the persons and their debts specified in the schedule; and therefore that the deed did not afford an equitable defence to an action by a creditor not named in the schedule.

Declaration by an indorsee of a bill of exchange against the acceptor.

Plea, as an equitable defence, that after the defendant had accepted the bill, and after it was indorsed to the plaintiff, the defendant had entered into a deed of composition under the Bankruptcy Act, 1861. The deed (which was set out at length) was an indenture between H. Mills, the defendant, of the first part, and the several persons whose names and seals are hereunto subscribed and set, being severally creditors in their own right, or in co-partnership, or being agents or attorneys of creditors of the defendant Mills, and all other persons being creditors of Mills, of the second part, after reciting that H. Mills was indebted to the several persons of the second part, and being unable to pay his debts in full, proposed to pay to the said persons a composition of 5*s.* in the pound on their respective debts, in the manner and upon the terms thereinafter expressed, which proposal was accepted by a majority in number, representing three-fourths in value of the said creditors, whose debts respectively amounted to ten pounds and upwards, as appeared by the respective hands and seals of such

majority, signed and set in the first and fourth columns of the schedule thereunder written, witnessed that H. Mills did "covenant with the said persons, parties hereto of the second part, and each of them and their and each of their executors, administrators, and assigns, in manner following:—First, that he, the said H. Mills, *shall and will pay*, or cause to be paid, *unto the said persons* respectively, their respective executors, administrators, or assigns, *the several sums of money placed opposite to the respective names of the said persons in the third column of the said schedule*, being the amount of the said composition of 5*s.* in the pound, which same several sums shall be paid, without any deduction whatsoever, by two equal instalments of 2*s.* 6*d.* in the pound; the first of such instalments at the expiration of three calendar months from the date hereof; and secondly, that he, the said Mills, shall and will forthwith make and deliver to the said persons respectively, their respective executors, administrators, or assigns, his promissory notes, payable at three calendar months and six calendar months from the date hereof, for the amount of the said several instalments. And it is hereby declared that until the said H. Mills shall fail to perform the covenants hereinbefore on his part contained, *the said persons, parties hereto of the second part*, respectively, shall not commence or bring any action, suit, or proceeding at law or in equity against, or make any claim or demand upon, or in any wise molest the said H. Mills, his estate or effects, *for, or by reason, or on account of the said debts specified in the second column of the said schedule.*" The deed also contained a proviso that nothing therein should invalidate any securities which any of the persons, parties hereto of the second part, have upon any specific property of H. Mills, in respect of any of the debts specified in the second column of the said schedule. The first column of the schedule (which was set out in the plea) contained the signatures and addresses of the creditors; the second, the amount of debts; the third, the amount of composition; the fourth, the seals of the persons executing; the fifth, the names of the witnesses. The plea, after setting out the deed, averred that all the requirements of the Bankruptcy Law, 1861, had been complied with, and concluded as follows:—And at the time of the execution of the said deed, the said bill of exchange had been, though unknown to the defendant, indorsed to the plaintiff, and

1865

BUVELOT v. MILLS.

the plaintiff was then, though unknown to the defendant, a creditor of the defendant in respect of the claim herein pleaded to, within the meaning of the Bankruptcy Act, 1861, and by reason of the defendant being, as he was till the commencement of this suit, wholly ignorant of the indorsement of the said bill to the plaintiff, and wholly ignorant who the holder of the said bill then was, and wholly ignorant of the plaintiff being a creditor of the defendant, or who was a creditor of the defendant in respect of the said bill, the defendant was unable to insert the amount of the said bill opposite the name of the plaintiff, or opposite the name of any creditor in the second column of the said schedule, and was unable to tender the said deed to the plaintiff for the insertion of the said amount, or for the execution of the said deed, and was unable to tender to the plaintiff the promissory notes in the deed mentioned; and the defendant, after he discovered that the plaintiff was the holder of the said bill, was at all times ready and willing, and, within a reasonable time after the commencement of this suit, tendered and offered to the plaintiff the said deed for subscription and execution by the plaintiff, and that the amount of the said bill should be placed opposite to the name of the plaintiff in the second column of the said schedule, and to give the plaintiff the said promissory notes, but the plaintiff wholly refused to subscribe his name to the said deed, and to execute the same, or to allow of the amount of the said bill being placed opposite to his name in the said second column of the said schedule, or to receive the said promissory notes, and that the plaintiff was bound by the deed as if he were a party to it, and had executed it.

Demurrer and joinder.

Replication that the plaintiff never executed or assented to the deed, and the debt sued for never was specified in the second column of the said schedule.

Demurrer and joinder.

*Joseph Brown, Q.C.*, for the plaintiff. The plea is bad, and the deed set out in it is not binding on the plaintiff. All the cases agree in this, that a composition deed under section 192 of the Bankruptcy Act must be for the benefit of all the creditors of the debtor; here the covenant to pay the composition is confined

to certain creditors, whose names, and the amount of whose debts are mentioned in a schedule to the deed. The objection to the deed is obvious: it makes no provision for the payment of the composition to the plaintiff, whose name, and the amount of whose debt, is not mentioned in the schedule. It is admitted that the plea affords no defence at law, and it is pleaded on equitable grounds, but it is equally bad as an equitable plea.

*Macnamara*, contrà. The deed is made with all the creditors of the debtor. It recites a proposal by the debtor to pay all his creditors the composition, and then the debtor covenants with all his creditors to pay the composition to all his creditors. It is true, the words in the covenant are to pay the several sums of money placed opposite to the respective names of the said persons in the third column of the schedule, being the amount of the said composition of 5*s.* in the pound; but these words may be rejected, because they are not of the substance of the covenant: they are mere description, they only define the amount of the composition to be paid; the deed is sufficiently certain without them. The deed would be perfectly good without the schedule, and some creditors being scheduled, and some not, makes no difference: *Harrhy* v. *Wall*, (1) *Whitmore* v. *Turquand*. (2) The defendant could have come in as a creditor at any time, and taken advantage of the deed: *Clapham* v. *Atkinson*. (3) For no creditor is excluded by express words in the present deed. It is clearly the intention of the parties to the deed that all the creditors should be paid; that is the essence of the covenant, and the Court will construe it so as to uphold the deed. Here, the debtor having obtained a statutory majority, all the creditors are bound, and those who have signed the deed having agreed to accept the composition in consideration of all receiving the same amount of composition, the plaintiff, by suing in this action, commits a fraud on the other creditors, for by so doing he may exhaust the fund which was to pay the composition: *Chitty on Contract, last edition*, 687.

[COCKBURN, C.J. There is a difference between this case and *Clapham* v. *Atkinson* (3), in that case no one was excluded, because the deed contained no words of exclusion; in the present case,

(1) 1 B. & A. 103. (2) 3 De. G. F. & J. 107; 30 L. J. (Ch.) 345.
(3) 4 B. & S. 730; 34 L. J. (Q. B.) 49.

1865

BUVELOT v. MILLS.

even if the plaintiff did come in, still he would be in no better position, because his name and debt are not included in the schedule, so that in that way he is excluded from all benefit under the deed.]

Under the Insolvent Act (1 Geo. IV. c. 119, s. 6.) if the insolvent did not know who was the holder of a bill of exchange, it was sufficient if he described the bill in general terms in his schedule, because it was impossible for him to insert the name of the particular holder; so here, the defendant did not know who was the holder of the bill, and he could not have inserted his name in the schedule; but as soon as he discovered who he was, he was quite willing to pay him the composition.

*J. Brown, Q.C.*, in reply. To construe the covenant as suggested by the other side, would mutilate it. If the debtor sued on the covenant he could recover nothing. If the whole scope of the deed is looked at, it is clear that the deed is not for the benefit of all the creditors of the debtor, but only of those whose names and the amount of whose debts are specified in the schedule.

COCKBURN, C.J. I am of opinion that the view contended for on behalf of the defendant is erroneous. The defendant is the acceptor of a bill of exchange, and it is impossible not to see that at the time that he executed the deed his liability to pay the bill to the plaintiff was not in his contemplation; he may have forgotten it, at all events, it was lost sight of. The words of the deed have reference entirely (as it appears to me) to the debts enumerated in the schedule. In the words of the deed the defendant covenants to pay "the several sums of money placed opposite to the respective names of the said persons in the third column of the said schedule, being the amount of the said composition of 5s. in the pound;" and the covenant not to sue expressly refers to the debts specified in the second column; so that reading these two clauses together, it seems to me that the deed has no application to a debt not comprehended in the schedule, and consequently no provision is made for the debt of the plaintiff. In order to make a deed under section 192 binding and effective upon the creditors who are not parties to it, otherwise than so far as the statute compulsorily makes them parties, the deed must provide for such

creditors in the same manner that it provides for those who are assenting parties; and inasmuch as if the plaintiff had claimed his composition, he could not have insisted upon it, nor brought an action to recover it, because the amount of his debt is not specified in the schedule to the deed, the deed fails in that which is essential to its validity. I think therefore that the deed for the present purpose is inoperative, and no bar to this action.

MELLOR, J. I am of the same opinion. I confess when I first read the deed I was of the opinion which I now hold, but Mr. Macnamara's ingenious argument rather induced me to think that the restrictive words of the covenant might be mere erroneous description. But when our attention is called to the words of the covenant not to sue I cannot help thinking that the restrictive words were intentionally inserted. To read the covenant for the payment of the composition in the manner Mr. Macnamara suggests, would be to make it inconsistent with the rest of the deed. Therefore, on the ground that this deed cannot be a bar to an action by creditors against whom it was not intended to apply, I think our judgment should be for the plaintiff.

LUSH, J. I am also of opinion that the plaintiff is entitled to our judgment. The title of the plaintiff to the payment of the composition rests entirely on the covenant for payment; and, although the deed contains a recital which seems to shew that it was the intention of the debtor to compound with all his creditors, yet when we come to the effective part of the deed we find that the covenant is limited to the payment of the sums specified in the schedule. It is not as if the debtor had said "I will pay the composition to all the creditors," but "I will pay the sums to the persons named in the schedule that are opposite their names, those sums being the amount due to those persons." If the schedule was incorporated in terms into the covenant, the covenant would be to pay to A. B. so much, to C. D. so much, enumerating all the persons. That would clearly limit the title of the persons under this deed to the particular amount specified in that covenant. The covenant has the same legal effect as if it had set out in its terms the names and amounts mentioned in the schedule. I do not see how, on any principle of law, we can reject any part of the covenant, so as to enlarge the number of persons to be paid, or to

1865

BUVELOT v. MILLS.

increase the amounts. The covenant on the part of the debtor is to pay specific sums to specific persons, and that this was not accidental, I think very clear by reference to the covenant not to sue, for that is also confined to persons whose names are mentioned in the schedule. Consequently, there is no provision made in the deed for those creditors whose names are not mentioned in the schedule, and the deed is no bar as against them.

*Judgment for the Plaintiff.*

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*Nov.* 27.

## THE QUEEN *v.* THE RATEPAYERS OF NORTHOWRAM AND CLAYTON.

*Local Government Act*, 1858 (21 & 22 *Vict. c.* 98), *ss.* 12, 13, 14, 16—*Adoption of the Act*—"*Place having defined boundary*"—*Ecclesiastical district under* 6 & 7 *Vict. c.* 37.

A district formed for ecclesiastical purposes, under the 6 & 7 Vict. c. 37, consisting of parts of two townships, each of which townships separately maintains its own poor and its own highways, is "a place having a known and defined boundary" within the meaning of section 12 of the Local Government Act, 1858, and is not a less place included within a greater within the meaning of section 14. Preliminary proceedings under ss. 14 and 16 are therefore unnecessary, and the district may at once adopt the act, at a meeting of owners and ratepayers, convened by the churchwardens; and an order of the Secretary of State confirming such adoption is valid.

QB. 119, 128 B. 231.

THIS was a rule obtained on behalf of the ratepayers of the townships of Northowram and Clayton, in the county of York, calling on the churchwardens of Queenshead, otherwise Queensbury, to shew cause why certain orders of Sir G. Grey, one of the Secretaries of State, relating to the adoption of the Local Government Act, 1858, by the ecclesiastical district of Queenshead, otherwise Queensbury, should not be quashed.

The orders had been brought up by certiorari; and it appeared on the affidavits that the district of Queenshead, otherwise Queensbury, was formed under the 6 & 7 Vict. c. 37, s. 9, as a district for spiritual purposes, in the year 1845. The district consisted of about 1300 acres, part of the township of Northowram, in the parish of Halifax, and about 290 acres, part of the adjoining township of Clayton, in the parish of Bradford. A small part of

1865

THE QUEEN v. THE RATEPAYERS OF NORTHOWRAM AND CLAYTON.

the township of Northowram, consisting of about sixty acres, was made part of the parliamentary borough of Halifax, under the 2 & 3 Wm. 4, c. 64, and this was adopted, under the 5 & 6 Wm. 4, c. 76, as the boundary of the municipal borough. The township of Northowram, however, in its entirety, continued as theretofore to separately maintain its own poor and its own highways. The township of Clayton also separately maintains its own poor and its own highways.

On the 10th of October, 1864, a meeting of the owners and ratepayers of the district of Queenshead was duly convened by the churchwardens of the district, in pursuance of a requisition in writing signed by twenty ratepayers or owners in the district, and a resolution was passed that "The Local Government Act, 1858, be adopted in the ecclesiastical district of Queenshead, otherwise Queensbury." Notice of this resolution was duly sent to the Secretary of State. Certain ratepayers of the township of Clayton, and of the township of Northowram, respectively, petitioned against the adoption of the act in the ecclesiastical district. Resolutions also adopting the act in the township of Clayton, and in that part of the township of Northowram not in the borough of Halifax, respectively, were also afterwards passed, and notices were sent to the Secretary of State.

After due inquiry, the Secretary of State made four orders, dismissing each of the petitions from the townships of Clayton and Northowram, and refusing to sanction the adoption of the act in the township of Clayton and in that part of the township of Northowram not in the borough of Halifax.

The first order, dated the 15th of December, 1864, after reciting that the Local Government Act, 1858, was adopted on the 10th of October then last, by "the ecclesiastical district of Queenshead, otherwise Queensbury," that due notice had been sent to the Secretary of State, and that a petition had been presented from certain owners and ratepayers in the township of Clayton against the adoption of the act in the said district (a portion of which was also a part of the said township), and that inquiry had been duly made, proceeded to state that the Secretary of State did make order that the said petition be dismissed, "and that the Local Government Act, 1858, have the force of law in the said ecclesiastical district of

1865

THE QUEEN v. THE RATEPAYERS OF NORTHOWRAM AND CLAYTON.

Queenshead, otherwise Queensbury, from the date of this present order."(1)

(1) The following sections of the 21 & 22 Vict. c. 98, are material:—

Section 12. The act may be adopted (1) in corporate boroughs to which the Public Health Act, 1848, has not been applied by a resolution of the council assembled at a meeting held for the purpose . . . . (2) In other places, under the jurisdiction of a board of Improvement Commissioners, . . . by a resolution of the commissioners assembled at a meeting held for the purpose. (3) In all other places having a known or definite boundary, by a resolution of the owners and ratepayers.

Section 13. Meetings for the purpose of the preceding section shall be summoned on the requisition in writing of any twenty ratepayers or owners — in corporate boroughs by the mayor; in other places under the jurisdiction of Improvement Commissioners, by the chairman of the commissioners; and in places having known and defined boundaries (not coming under the preceding heads), by the churchwardens, or one of them; or if there are no such officers, by the overseers, or one of them; or if there is none of these officers, or if such officer neglects or is unable to perform the duties, by any person appointed by one of the Secretaries of State. (Then follow regulations for the passing of resolutions for the adoption of the act.)

Section 14. In cases where any place hereby authorized to adopt this act includes within its limits any less place which, if it were not so included, would of itself be authorized to adopt this act, such less place shall not be entitled to adopt this act unless the greater place has refused to adopt such act, or unless it has been determined by one of the Secretaries of State that such place ought, as respects the adoption of this act, to be excluded from the limits of such greater place.

Section 16. (1) Any place not having a known or defined boundary may petition one of the Secretaries of State to settle its boundary for the purposes of this act. (2) The petition should state the proposed boundary of the place, should be signed by one-tenth of the ratepayers resident within such boundaries, and should be supported by such evidence as the Secretary of State may require. (3) Upon the receipt of such petition, the Secretary of State may direct inquiry to be made as to the genuineness of the petition, and as to the propriety of the proposed boundaries. (4) Fourteen days notice of such inquiry is to be given. (5) The Secretary of State, upon consideration, may dismiss the petition, or make an order as to the boundaries. . . . . (6) Any place the boundaries of which have been so settled shall for the purposes of the act be deemed to be a place with a known and defined boundary, and may adopt this act accordingly; and for the purpose of enabling it to do so, a summoning officer shall be appointed by the order settling the boundary. . . . .

Section 17 enables any number not less than one-twentieth of the owners and ratepayers to petition against the adoption of the act in any place, and regulates the proceedings thereon. And after inquiry—(5) The Secretary of State shall make order with respect to the matter in question on such appeal, and such order shall be binding on the place in respect of which it is made, and the order shall state the time at which this act is to come in force.

*Bovill, Q.C.*, and *Maule*, shewed cause. The Local Government Act, 1858 (21 & 22 Vict. c. 98,) s. 12, points out how the act may be adopted—1. In corporate boroughs; 2. In places under the jurisdiction of a board of commissioners; and, 3. "In all other places having a known and defined boundary, by a resolution of the owners and ratepayers." The district of Queensbury comes within the last head, for although it was formed, under the 6 & 7 Vict. c. 37, for ecclesiastical purposes only, it has a well-known and defined boundary. Section 13 is corroborative of this view, for it requires the meeting to be called by the churchwardens, if there are any, or by the overseers, or, if there are no such officers, by a person to be appointed for the purpose, clearly contemplating places other than parishes proper. In the present case, the meeting was duly summoned by the churchwardens. Then it is said that section 14 applies, and that this is a smaller place within a greater, and that it was not entitled to adopt the act until the greater had refused to adopt it, or the Secretary of State had made an order that it ought, as respects the adoption of the act, to be excluded from the limits of the greater place; but it is impossible to say that the district of Queensbury is within either of the townships of Northowram or Clayton, still less within Bradford or Halifax. If this be a place with a defined boundary, the objection that the Secretary of State had not first defined the boundary, under section 16, before allowing the adoption of the act, falls to the ground.

*Kemplay*, in support of the rule. The district was formed for spiritual purposes only, under sections 9 and 11 of the 6 & 7 Vict. c. 37. By section 17 the churchwardens are appointed expressly only for ecclesiastical matters, and not for secular affairs; and section 18 enacts that, until parliament shall otherwise determine, the rights, privileges, and liabilities, ecclesiastical and civil, of any district formed in a parish, except as in the act expressly provided, shall remain unaltered. This is confirmed by *Reg.* v. *Archdeacon of Exeter* (1), which shews that the district is still part of the parish at large for all secular matters; and *Reg.* v. *King-*

Section 19 regulates the notice to be given to the Secretary of State of the adoption of the act, and advertising the same.

(1) 1 N. R. 267.

1865

THE QUEEN v. THE RATEPAYERS OF NORTHOWRAM AND CLAYTON.

*swinford* (1) is an authority that churchwardens whose duties are confined to ecclesiastical matters are not churchwardens within the meaning of the act. This district, therefore, is not a place having a known and defined boundary within the meaning of section 12 of the 21 & 22 Vict. c. 98, which relates entirely to secular matters; and the proceedings were invalid, as they ought to have been taken under section 16. Again, if it be "a place with a known and defined boundary," then the proceedings are equally erroneous, because the churchwardens, officers for spiritual purposes only, were not churchwardens to summon a meeting for secular purposes; and also because neither had any preliminary refusal to adopt the act been passed under section 14 by the greater places, within which Queensbury is situate, nor had the Secretary of State ordered that it should be excluded, for the purposes of the act, from the limits of such places.

MELLOR, J. I entertain no doubt in this case. Mr. Kemplay's argument is a mere hypercriticism upon the provisions of the act. Whatever might be the case with the original act of 1848, by the 12th and 13th sections of the amended act, all difficulty seems to be removed. Section 12 directs how the act may be adopted in different classes of places:—1st, in corporate boroughs; 2nd, in places under a board of commissioners; 3rd, in all other places having a known or defined boundary, by a resolution of the owners and ratepayers within that boundary. Now, Mr. Kemplay must admit that the present district is a place with a known and defined boundary for certain public purposes, although those purposes were ecclesiastical only; it therefore comes within the definition. Provision is then made, by section 13, as to the mode of summoning meetings for the purpose of the preceding section; and this in places having known and defined boundaries, and not coming within the other two classes, is to be by the churchwardens, or one of them; or, if no churchwarden, by the overseers, or one of them; or, in failure of either of these officers, by a person to be appointed by the Secretary of State. In the present case the meeting was duly convened by the churchwardens. Then we have a meeting duly convened and the act adopted

(1) 3 E. & B. 688; 23 L. J. (Q. B.) 337.

1865

THE QUEEN v. THE RATEPAYERS OF NORTHOWRAM AND CLAYTON

by a resolution of the owners and ratepayers of a place having notorious defined boundaries; and the proceedings have been regular, unless the adoption of the act in this particular place is prohibited by section 14. But that section has no application to the present case. The fact that the district was made up of part of two townships, and the other circumstances of the case, might have been good ground for the Secretary of State to refuse his sanction to the adoption of the act in this district; but the Secretary of State, after inquiry, makes his order that the act shall be adopted within this particular district. It is admitted by Mr. Kemplay that the Secretary of State might, under section 16, have defined a new district by these very boundaries, but the argument was that the proceedings ought to have been under that section. I doubt whether that argument would now be available; at all event it fails, as this was a place having a known and defined boundary. I think, therefore, the order was good, and made according to law, and the rule must be discharged.

LUSH, J., concurred.

*Rule discharged.*

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[IN THE EXCHEQUER CHAMBER.]

LLOYD *v.* GUIBERT AND OTHERS.

*Nov.* 27.

*Ship—Contract of Affreightment, governed by what law as to sea damage—Authority of Master to bind Owners—Conflict of Laws—Law of France—Bottomry.*

Where the contract of affreightment does not provide otherwise, as between the parties to the contract, in respect of sea damage and its incidents, the law of the country to which the ship belongs must be taken to be the law to which they have submitted themselves.

The plaintiff, a British subject, chartered a French ship belonging to French owners, at a Danish West India port, for a voyage from St. Marc, in Hayti, to Havre, London, or Liverpool, at charterer's option. The charter-party was entered into by the master in pursuance of his general authority as master. The plaintiff shipped a cargo at St. Marc for Liverpool, with which the vessel sailed. On her voyage she sustained sea damage and put into Fayal, a Portuguese port, for repair. There the master properly borrowed money on bottomry of ship, freight, and cargo, and repaired the ship, and she completed her voyage to Liverpool. The bond-holder proceeded in the Court of Admiralty against the ship, freight, and cargo. The ship and freight were insufficient to satisfy the bond; and the deficiency with costs fell on the plaintiff as owner of the cargo, for which he sought indemnity

1865

LLOYD v. GUIBERT.

against the defendants, the French shipowners. The defendants gave up the ship and freight to the shipper, so as that, by the alleged law of France, the abandonment absolved them from all further liability on the contract of the master:—

*Held*, that the parties must be taken to have submitted themselves, when making the charter-party, to the French law as the law of the ship, and therefore that, assuming the law of France to be as alleged, the plaintiff's claim was absolutely barred.

ERROR from the judgment of the Court of Queen's Bench in favour of the defendants, on demurrers, to a plea and replication.

Declaration that the defendants were the owners of the ship *Olivier*, of which J. F. Lemaire was duly appointed by the defendants master; and the plaintiff, while the ship was in the West Indies, shipped on board a cargo of goods, of the value of 3000*l*., to be carried thence and delivered to the plaintiff at Liverpool, the dangers of the seas and navigation only excepted, for certain freight to be by the plaintiff paid to the defendants. That the ship on her voyage sustained damage from stormy weather, and was obliged to put into Fayal for repairs, that the ship was repaired, and that the master there borrowed, to pay for the repairs, &c., a sum amounting, with interest, to 2400*l*., under circumstances justifying such borrowing and hypothecation, upon three bottomry bonds upon the ship, freight, and cargo, conditioned for the payment of principal and interest ten days after due completion of the voyage. That the defendants had notice of the premises, and in consideration thereof promised the plaintiff to indemnify him, as owner of the cargo, against any consequent loss. That the ship afterwards sailed, and arrived safely with the cargo at Liverpool. That the money not being repaid, the bonds were put in suit in the Court of Admiralty, and that the plaintiff, in order to save the cargo from being sold by the court, was compelled to become a party to the suit, and was compelled to pay 1500*l*., being less than the value of the cargo, and over and above the freight payable in respect thereof, together with 200*l*. costs. That although all things, &c., have happened to entitle the plaintiff, as owner of the cargo, to be indemnified, yet the defendants have not repaid the said sums, &c.

First plea. That the cargo was loaded under a charter-party made between the plaintiff and the master at the Island of St.

Thomas, in the West Indies, by which it was provided that the master should freight the ship, called in it a French ship, then in St. Thomas's, for a voyage from St. Marc, in Hayti, to Havre, in France, or London, or Liverpool, at the plaintiff's option. That the ship was a French ship, and the defendants, the owners, French subjects; and according to the laws of France, it is lawful for the owners of a French ship, in all cases, to free themselves from the acts and engagements of the master, in all that concerns the ship and cargo, by the abandonment of the ship and freight. That the bottomry bonds were executed by the master without any express authority from the defendants; and they have refused to ratify, and never did ratify, the act of the master; and that but for the bottomry bonds and the suit the goods would have been duly delivered to the plaintiff at Liverpool. That on the suit in the Court of Admiralty, the ship was sold, and the proceeds, together with the freight, applied towards payment of the bonds. That the defendants did not appear in the suit, but, in order to obtain the protection afforded to shipowners by the law of France, they abandoned the ship and freight. That by such abandonment the defendants became released, according to the laws of France, from all liability to the plaintiff, in respect of the cargo not being delivered to him at Liverpool, and the acts of the master in executing the bonds, and the consequences thereof; and the defendants, except as aforesaid, did not promise to the plaintiff to indemnify him against any loss as owner of the cargo.

Demurrer and joinder.

Second replication to the first plea. That after the making of the charter-party, and before the making of the bottomry bonds, and of the promise of indemnity in the declaration mentioned, the plaintiff exercised his option, and fixed Liverpool as the port of discharge. That the law in force in St. Thomas's, where the charter-party was made, and in Hayti, where the cargo was shipped, and in Fayal, where the bottomry bonds were made and the promise of indemnity given, is not the law of France, but is the general maritime law, and similar to the law of England in respect of the premises. That no part of the voyage, and no part of the charter-party, or of the said promise, was to be or was performed

1865

LLOYD v. GUIBERT.

in France, or in any other part of the world in which the laws of France are in force.

Demurrer and joinder.

The Court of Queen's Bench gave judgment for the defendants, on the ground that the power of the master to bind his owners personally is but a branch of the general law of agency, and that the flag of the ship was notice to the plaintiff, that the master's authority to bind his owners was subject to the limitation stated in the plea to be imposed by the law of France. (1)

The case was argued after Trinity Term by

*Crompton Hutton*, for the plaintiff,

*J. H. Hodgson*, for the defendants. (2)

*Cur. adv. vult.*

Nov. 27. The judgment of the Court (Erle, C.J., Pollock, C.B., Martin, B., Willes, and Keating, JJ., and Pigott, B.) was delivered by

WILLES, J. The facts disclosed by the record are as follows:— The plaintiff below, a British subject, at St. Thomas, a Danish West India Island, chartered the ship *Olivier*, belonging to the defendants, who are Frenchmen, for a voyage from St. Marc, in Hayti, to Havre, London, or Liverpool, at the charterer's option. The plaintiff must have known that the ship was French. The charter-party was entered into by the master in pursuance of his general authority as master, and not under any special authority from the owner. The plaintiff shipped a cargo at St. Marc for Liverpool, with which the vessel sailed. On her voyage, she sustained damage from a storm, which compelled her to put into Fayal, a Portuguese port, for repair. There the master properly borrowed money upon bottomry of the ship, freight, and cargo, and repaired the ship, which proceeded with the cargo, and arrived in safety at Liverpool. The bondholder proceeded in the Court of Admiralty against the ship, freight, and cargo. The ship and freight were insufficient to satisfy the bond; the deficiency and

(1) See the report of the case in the court below, 33 L. J. (Q. B.) 241.

(2) The case having been argued before Michaelmas Term, the reporter has no note of the arguments and cases cited.

(1) SC 10 Jur NS 949

1865

LLOYD v. GUIBERT.

costs fell upon the plaintiff as owner of the cargo, and in respect thereof he seeks to be indemnified by the defendants as shipowners.

The defendants abandoned the ship and freight; and it must be taken as a fact (because it is alleged and not denied) that, by the law of France, they abandoned in time, and in such manner, and under such circumstances as are required by the French law, and that according to such law, abandonment, by which we understand a giving up of the ship and freight to the shippers (see *Dakin* v. *Oxley*) (1), absolved them from liability. This law, if applicable, is one which furnishes an absolute bar to the plaintiff's claim by way of satisfaction or discharge, and affected the validity of the claim, and not merely the mode of proceeding to enforce it. Whether the French law permits abandonment under such exceptional circumstances is a question of fact not before us, and which for the present purpose we must assume to be answered in the affirmative; (see, however, *Devilleneuve et Massé Dictionnaire du Contentieux Commercial, titre Armateur*, ss. 23, 25).

By the English law, a shipowner, under such circumstances, is liable personally, and not merely to the value of the ship and freight. And it is alleged, and not denied, that the Danish Portuguese and Haytian laws agree in this respect with our own. The law of Hayti was not however relied upon in argument.

Upon these facts, it was insisted for the plaintiff that the decision ought to proceed upon either what was called the "general maritime law," as regulating all maritime transactions between persons of different nationalities at sea; the Danish law, as that of the place where the contract was made ("lex loci contractus"); the Portuguese law, because the bottomry bond, which in one sense caused the question to arise, was given in a Portuguese port, and the rule that the place governs the act ("locus regit actum") was supposed, therefore, to furnish a solution; or the English law, as being that of the place of the final act of performance by the delivery of the cargo ("quasi lex loci solutionis"), in either of which alternatives the liability of the defendants was established. And it was argued, that, the charter-party having been entered into *bonâ fide* in the ordinary course of business by the master,

(1) 15 C. B. (N. S.) 646; 33 L.J (C. P.) 115.

1865

LLOYD v. GUIBERT.

within the scope of his ostensible authority to contract for the employment of the vessel, which the owner, by appointing a master and sending him abroad in command, allows him to assume, the right of the charterer could no more be narrowed by a provision of foreign law unknown to him than by secret instructions from the owners, which would clearly be inoperative—a proposition which needs no authority in our law, and for which French authorities will be found in Pailliet's edition of the *Code de Commerce*, art. 216, in the note.

For the defendants, it was answered, that by the French law they are absolved; and that that law, as being that of the ship, governs the case, either because the character of the transaction itself, showing that the plaintiff impliedly submitted his goods to the operation of the law of the ship, or because the master, who entered into the contract (although his doing so was within the scope of the authority which he was allowed by the owners to assume), was disabled by the French law from binding his owners, otherwise than with the exception expressed or implied of exemption from liability by abandonment, and that of such disability, or lack of authority, his flag was sufficient notice.

Upon this latter ground, the Court of Queen's Bench gave judgment for the defendants, not expressing any opinion upon the former; whereupon the plaintiff brought error, and the case was well argued at the sittings after Trinity Term last, before Erle, C.J., Pollock, C.B., Martin, B., Keating, J., Pigott, B., and myself, when we took time to consider.

In determining a question between contracting parties, recourse must first be had to the language of the contract itself, and (force, fraud, and mistake apart) the true construction of the language of the contract (lex contractus) is the touchstone of legal right. It often happens, however, that disputes arise, not as to the terms of the contract, but as to their application to unforeseen questions, which arise incidentally or accidentally in the course of performance, and which the contract does not answer in terms, yet which are within the sphere of the relation established thereby, and cannot be decided as between strangers.

In such cases it is necessary to consider by what general law the parties intended that the transaction should be governed, or rather

to what general law it is just to presume that they have submitted themselves in the matter.

A familiar illustration of this will be found in the rule, that the lawful usages of a market are as much part of a contract entered into there, which does not expressly exclude them, as if they were set down at large. The binding force of such usages does not depend so much upon the knowledge of the parties as upon implied acquiescence: for whoso goes to Rome must do as those at Rome do.

So in the absence of express provision or special usage, the general law itself, in many points of view only a more extended usage, supplies the gaps which the parties have left, and in doing so sometimes modifies the construction of general words in the contract. For instance, a common carrier, while on the one hand he is bound by stringent rules for the protection of his customers, on the other is allowed certain exemptions from liability, even upon an express contract if it do not exclude such exemptions: thus, by the common law of England a person who expressly contracts absolutely to do a thing, not naturally impossible, is not excused for non-performance because of being prevented by the act of God, or the King's enemies (*Paradine* v. *Jane*) (1); and yet, in consideration of the risks to which common carriers are exposed, such prevention is in their case an implied exception. And in the case of ordinary bailees entrusted with the custody of goods, whether by express contract or not, the exceptions of overwhelming force (vis major), and accident without fault (casus fortuitus), are implied.

In the case of carriers by sea, these latter exceptions (vis major and casus fortuitus) are now, as to British ships stipulated for by the common exception in the charter-party, or bill of lading; whilst in foreign contracts of affreightment, even when made in British ports, such express stipulation is sometimes omitted; as for instance in the Spanish charter, in *Blasco* v. *Fletcher*; (2) because by the law of many countries such an exception is implied (see *Casaregis Disc.* xxiii; *Codigo de Comercio*, art. 935; *Allgemeines Deutsches Handels-gesetzbuch*, art. 703). So that in the case just referred to, if the lex loci contractus were to prevail, the owner of a

(1) Aleyn, 26. (2) 14 C. B. (N. S.) 147; 32 L. J. (C. P.) 284.

1865

LLOYD v. GUIBERT.

Spanish vessel, chartered in Liverpool for the Havana, might lose the protection which the owners of an English vessel would of course have stipulated for.

LD 362
LD 626

And this diversity (or conflict) upon a point so important, shews that the present and like questions affect not only contracts entered into by masters of ships, the law of whose country distinguishes between the obligations of a contract by the master as such, and that of the owner himself, or his broker, or of the master acting with a plenary authority, but touch all contracts of affreightment entered into in respect of any vessel in a port foreign as to her, whether the master happens to be an owner or not.

Hitherto we have viewed the question generally; but in order to its satisfactory solution as applied to the present case, we must deal with the operative facts, that the contract of affreightment was made by persons of different nationalities in a place where both of them were foreigners, to be performed, partly there by breaking ground in order to start for the port of loading,—a place where both parties would also have been foreigners; partly at the latter port by taking the cargo on board; and partly on board a ship at sea, subject there to the laws of her own country, and never out of its jurisdiction as to acts done by those on board; and partly by final delivery in the port of discharge; that the principal subject-matter of the contract was the employment of a foreign ship for a voyage across the high seas; and that the question in dispute arose in consequence of sea damage to the ship, and its ordinary result.

In the diversity or conflict of laws, which ought to prevail, is a question that has called forth an amazing amount of ingenuity, and many differences of opinion. It is, however, generally agreed that the law of the place where the contract is made, is *primâ facie* that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as for instance, that the contract is to be entirely performed elsewhere, or that the subject-matter is immoveable property situate in another country, and so forth; which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general one, by reason of

the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made; which intention is inferred from the subject-matter and from the surrounding circumstances, so far as they are relevant to construe and determine the character of the contract.

The present question does not appear to have ever been decided in this country, and in America it has received opposite decisions, equally entitled to respect (1). We must therefore deal with it as a new question, and endeavour to be guided in its solution by a steady application of the general principle already stated, viz., that the rights of the parties to a contract are to be judged of by that law by which they intended, or rather by which they may justly be presumed to have bound themselves.

We must apply this test successively to the various laws which have been suggested as applicable; and first to the alleged general maritime law.

We can understand this term in the sense of the general maritime law as administered in the English courts, that being in truth nothing more than English law, though dealt out in somewhat different measures in the Common Law and Chancery Courts, and in the peculiar jurisdiction of the Admiralty; but as to any other general maritime law by which we ought to adjudicate upon the rights of a subject of a country which, by the hypothesis, does not recognize its alleged rule, we were not informed what may be its authority, its limits, or its sanction. Passing over the common ground of ethics, and the elementary ideas of natural law (jus gentium), such as the rights of prior occupancy and self-preservation, the privileges and exemption of necessity, the common duties of humanity, of more or less perfect obligation, the idea of property, including the obligation of contracts, and those obligations, for the most part conventional, upon which is based the modern system of international law (jus inter gentes): inasmuch as these supply no precise rule for the matter in hand—it would be difficult to maintain that there is, as to such questions as the present, depending in a great measure upon national policy and economy, any general in the sense of universal law, binding at sea, any

(1) See Arayo *v.* Currell, 1 Louis. Rep. 528, and Pope *v.* Nickerson, 3 Story's Rep. 465.

1865

LLOYD v. GUIBERT.

more than upon land, nations which either have not assented or have withdrawn their assent thereto.

Moreover, we are not satisfied that there is any such general concurrence of mankind, that shipowners should be absolutely answerable personally for the acts of the master. Pothier (*sur la Charte-partie*, part. 1, no. 34) was cited in the affirmative, and Emerigon (*Contrat à la grosse*, c. 4, s. 11) upon the negative side. Pothier founding his interpretation upon the civil law, de exercitoriâ actione (see *Valin sur l'Ordonnance*, Livre 2, Tit. 8, Art. 2), thought that the clause of the celebrated "Ordonnance de la Marine" of 1681 (Livre 2, Tit. 8, Art. 2), from which Art. 216 of the Code de Commerce was taken, applied only to illicit acts of the master, and that upon his contracts the owner was liable, and could not get rid of liability by abandonment. Emerigon, on the other hand, founding his opinion upon the general rule of maritime law, as he understood it, thought that from liability for all acts of the master, whether licit or illicit, including contracts, the owner could free himself by abandonment. The jurisprudence of the Court of Cassation leant towards the opinion of Pothier, and that led, in 1841, to the modification of Art. 216 to its present shape, by which, according to the statement of the learned annotator in *Sirey's Code de Commerce annoté*, by Gilbert, note 18 upon Art. 216, the opinion of Emerigon is now established in France. To this may be added that similar, though not identical, provisions for the protection of the owner are to be found in other codes; for instance, that of Spain (*Codigo de Comercio*, Art. 621, 622) and Prussia (*Allgemeines Deutsches Handels-gesetzbuch*, Art. 451, 452, 453, and the following).

This is sufficient to show that there is no general uniform rule in maritime law upon the subject; indeed, looking at home, there seems little if any difference in principle between the French law under consideration, and our own statutory provisions for limited liability, in respect of obligations by reason of collision, which latter have now by express enactment been extended to collision between British and foreign vessels (25 & 26 Vict. c. 63, s. 54, *The Amalia*). (1)

In truth, any general, much more any universal maritime law,

(1) 1 Moo. P. C. (N. S.) 471; 32 L. J. (P. M. & A.) 191.

binding upon all nations using the highway of the sea in time of peace, except when limited as administered in some court, is easier longed for than found. Accordingly, we observe that both the very learned Judge of the Court of Admiralty, and the Judicial Committee of the Privy Council, in deciding, in the case of *The Hamburg* (*Duranty* v. *Hart*) (1), that the validity of a bottomry bond given in a foreign port was to be determined by the general maritime law, and not by the law of the ship or the port where the bond was given, added to the expression "the general maritime law" this qualification, viz. "as administered in England." That case was cited as an authority, and at first sight it appeared to be one, for applying English law to the present case, but upon consideration it appears altogether distinguishable. The alleged agency of the master in that case was founded upon necessity alone, and it was incumbent upon the bondholder to establish such necessity by evidence, and in order to do that he was bound (according to the rule prevailing since the case of the *Bonaparte*) (2) to show a communication with the owner of the cargo, that being, as the court held, reasonably practicable. So that the lex fori was undoubtedly supreme upon the question which then arose, it being one of evidence and procedure. Had the decision been intended to go further, the Judicial Committee of the Privy Council would probably have considered and compared the case of *Cammell* v. *Sewell* (3), and pointed out the distinction in this respect between a hypothecation in case of necessity, and a sale in case of necessity, which, according to the decision of the majority of the Court in *Cammell* v. *Sewell* (3), against the opinion of Byles, J., depends for its validity upon the law of the place where the sale was made, and not the general maritime law as administered in England; upon which, however, we offer no opinion.

In one other point of view the general maritime law, as administered in England, or (to avoid periphrasis) the law of England, viz. as the law of the contemplated place of final performance, or port of discharge, remains to be considered. It is manifest, however, that what was to be done at Liverpool (besides that, it might

(1) 2 Moo. P. C. (N. S.) 289; 33 L. J. (P. M. & A.) 116.
(2) 8 Moo. P. C. 459.
(3) 5 H. & N. 728; 29 L. J. (Ex.) 350.

1865

LLOYD v. GUIBERT.

at the charterer's option have been done at Havre) was but a small portion of the entire service to be rendered, and that the character of the contract cannot be determined thereby. It is true that as to the mode of delivery the usages of Liverpool would govern, as those of Algiers did in *Robertson* v. *Jackson* (1), and as, in the mode of taking on board the cargo, the usage of the port of loading would be regarded (see *Hudson* v. *Clementson* (2), and the custom set out in the pleadings in *Gattorno* v. *Adams* (3), which custom was proved at the trial at Guildhall sittings after Michaelmas Term, 1862, and made an end of the case). And in this point of view it seems impossible to exclude the law of England or even that of Hayti from relevancy in respect of the manner of performing that portion of the service contracted for, which was to be rendered in their respective territories; because the ship must needs for the time being conform to the usages of the port where she is. And for a like reason, the adjustment of a general average at the port of discharge, according to the law prevailing there, is binding upon the shipowner and the merchant, who must be taken to have assented to adjustment being made at the usual and proper place, and, as a consequence, according to the law of that place: *Simonds* v. *White*. (4)

It is unnecessary, however, to discuss this point further, because we have been anticipated and the question set at rest, in an instructive judgment of the Judicial Committee, delivered by the Lord Justice Turner, since the argument of the present case, in that of *The Peninsular and Oriental Company* v. *Shand* (5); where a passenger in an English vessel from Southampton to Mauritius, where French law prevails, sued the shipowners for the loss of his luggage upon an alleged liability by French law, from which liability the shipowner was exempt by the English law; and the passenger obtained judgment in his favour in the Mauritius court, which judgment was reversed upon appeal by the Judicial Committee, their Lordships holding that the law of England governed the case.

Next, as to the law of Portugal: the only semblance of authority

(1) 2 C. B. 412.
(2) 18 C. B. 213; 25 L. J. (C. P.) 234.
(3) 12 C. B. (N.S.) 560.
(4) 2 B. & C. 805.
(5) Privy Council, 20 July, 1865; 11 Jurist (N. S.) 771.

for resorting to that law, as being the law of the place where the bottomry bond was given, is the case already referred to of *Cammell* v. *Sewell* (1); and we consider that the judgment in that case, if applicable at all, as to which we say nothing, could only affect the validity of the bottomry, and not the duties imposed upon the shipowner towards the merchant by the fact of the bottomry, which duties must be traced to the contract of affreightment and the bailment founded thereupon.

The law of Hayti was not mentioned nor relied upon in argument; and there remain only to be considered the laws of Denmark and of France, between which we must choose.

In favour of the law of Denmark, there is the cardinal fact that the contract was made within Danish territory; and, further, that the first act done towards performance was weighing anchor in a Danish port.

For the law of France, on the other hand, many practical considerations may be suggested; and, first, the subject-matter of the contract, the employment of a sea-going vessel for a service, the greater and more onerous part of which was to be rendered upon the high seas, where, for all purposes of jurisdiction, criminal or civil, with respect to all persons, things, and transactions, on board, she was, as it were, a floating island, over which France had as absolute, and for all purposes of peace as exclusive, a sovereignty as over her dominions by land, and which, even whilst in a foreign port—according to notions of jurisdiction adopted by this country (18 & 19 Vict. c. 91, s. 21; 24 & 25 Vict. c. 94, s. 9), and carried to a greater length abroad (*Ortolan Diplomatie de la Mer*, c. xiii., the work of a French naval officer, but of which a jurist might well be proud)—was never completely removed from French jurisdiction.

Further, it must be remembered that, although bills of lading are ordinarily given at the port of loading, charterparties are often made elsewhere; and it seems strange and unlikely to have been within the contemplation of the parties that their rights or liabilities in respect of the identical voyage should vary, first, according as the vessel was taken up at the port of loading or not; and secondly, if she were taken up elsewhere, according to the law

(1) 5 H. & N. 728; 29 L. J. (Ex.) 350.

1865

LLOYD v. GUIBERT.

of the place where the charterparty was made, or even ratified. If a Frenchman had chartered the *Olivier* upon the same terms as the plaintiff did, it would seem strange if he could appeal to Danish law against his own countryman because of the charterparty being made or ratified in a Danish port, though for a service to be rendered elsewhere, by a transient visitor, for the most part within French jurisdiction.

Moreover, there are many ports which have few or no seagoing vessels of their own, and no fixed maritime jurisprudence, and which yet supply valuable cargoes to the ships of other countries. Take Alexandria, for instance, with her mixed population and her maritime commerce almost in the hands of strangers. Is every vessel that leaves Alexandria with grain under a charterparty or bill of lading made there, and every passenger vessel leaving Alexandria or Suez, be she English, Austrian, or French, subject to Egyptian law? As to not a few half-savage places in Africa and Asia, with neither seagoing ships nor maritime laws, a similar question—What is the law in such cases, or is there none except that of the court within whose jurisdiction the litigation first arises?

Again, it may be asked, does a ship which visits many ports in one voyage, whilst she undoubtedly retains the criminal law of her own country, put on a new sort of civil liability, at each new country she visits, in respect of cargo there taken on board? An English steamer, for instance, starts from Southampton for Gibraltar, calling at Vigo, Lisbon, and Cadiz. A Portuguese going in her from Southampton to Vigo would naturally expect to sail subject in all respects to English law, that being the law of the place and the ship. But if the locality of the contract is to govern throughout, an Englishman going from Vigo to Lisbon on the same voyage would be under English law as to crimes and all obligations not connected with the contract of carriage, but under Spanish law as to the contract of carriage; and a Spaniard going from Lisbon to Cadiz during the same voyage would enjoy Portuguese law as to his carriage, and be subject to English law in other respects.

The cases which we have thus put are not extreme nor exceptional; on the contrary, they are such as would ordinarily give rise to the question, which law is to prevail? The inconvenience and

even absurdities which would follow from adopting the law of the place of contract in preference to that of the vessel, are strong to prove that the latter ought to be resorted to.

No inconvenience comparable to that which would attend an opposite decision has been suggested. The ignorance of French law on the part of the charterer is no more than many Englishmen contracting in England with respect to English matters might plead as to their own law, in case of an unforeseen accident.

Nor can we allow any weight to the argument, that this is an impolitic law, as tending to interfere with commerce, especially in making merchants cautious how they engage foreign vessels. That is a matter for the consideration of foreigners themselves, and nothing short of a violation of natural justice, or of our own laws, could justify us in holding a foreign law void because of being impolitic. No doubt the French law was intended to encourage shipping, by limiting the liability of shipowners, and in this respect it goes somewhat further than our own; but whether wisely or not is matter within the competence and for the consideration of the French legislature, and upon which, sitting here, we ought to pronounce no opinion.

Exceptional cases, should they arise, must be dealt with upon their own merits. In laying down a rule of law, regard ought rather to be had to the majority of cases upon which doubt and litigation are more likely to arise; and the general rule, that where the contract of affreightment does not provide otherwise, there, as between the parties to such contract, in respect of sea damage and its incidents, the law of the ship should govern, seems to be not only in accordance with the probable intention of the parties, but also most consistent and intelligible, and therefore most convenient to those engaged in commerce.

In order to preclude all misapprehension, it may be well to add, that a party, who relies upon a right or an exemption by foreign law, is bound to bring such law properly before the Court, and to establish it in proof. Otherwise the Court, not being entitled to notice such law without judicial proof, must proceed according to the law of England (see *Brown* v. *Gracey*, note to *Lacon* v. *Higgins*). (1)

(1) D. & R., N. P. 41, n.

1865

LLOYD v. GUIBERT.

For these reasons we have arrived at the same conclusion as the Court of Queen's Bench; and without examining the grounds upon which that court proceeded, we are of opinion that the judgment was right, and ought to be affirmed.

*Judgment affirmed.*

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*Nov.* 27.

BRAND AND WIFE *v.* HAMMERSMITH AND CITY RAILWAY COMPANY.

*Railway—Compensation—Lands injuriously affected—Annoyance by vibration after construction of railway—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 68; *Railway Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 6 *and* 16.

The owner of a house, none of whose lands have been taken for the purposes of the railway, cannot under the Lands Clauses Consolidation Act, 1845, or the Railway Clauses Consolidation Act, 1845, recover compensation in respect of injury to the house depreciating its value, caused by vibration, smoke, and noise, in running locomotives with trains in the ordinary manner, after the construction of the railway.

THIS was an action brought by the plaintiffs against the defendants to recover 272*l.*, balance of 1141*l.*, the amount for which judgment had been recovered by the female plaintiff, Mary Christiana Louisa, then Mary Christiana Louisa Piper, widow, against the defendants, upon an inquisition held before the Sheriff under the Lands Clauses Consolidation Act, 1845, to assess the compensation to be paid by the defendants to the plaintiff, Mary Christiana Louisa, as executrix and devisee in fee of one R. M. Piper, for injury sustained in his lifetime, and by Mary Christiana Louisa since his decease, by a certain messuage, buildings, garden, and land, having been and being injuriously affected by reason of the execution or construction of the railway and works authorized by the defendants' acts of parliament and acts incorporated therewith.

After declaration, a case was stated by consent.

R. M. Piper, deceased, at his death was seised in fee in possession of a certain messuage, outbuildings, garden, and lands, situate at Shepherds' Bush, in the county of Middlesex, known as Cumberland House. He died in October, 1863, having made his will, and appointed his wife, the female plaintiff, and certain other per-

sons, his executors; and, amongst other bequests, he devised and bequeathed to the female plaintiff, and the other persons, all his freehold and leasehold messuages, lands, tenements, and hereditaments, and the residue of his personal estate, upon certain trusts. The female plaintiff obtained probate of the will, and she was, at the time of the taking of the inquisition, sole executrix of the testator, and solely seised in fee in possession of the messuage, outbuildings, garden, and lands, as trustee under the will.

By the Hammersmith and City Railway Act, 1861, the defendants were incorporated, and were empowered to make and maintain a certain railway and works, as therein mentioned, and to enter upon, take, and use, certain lands for the purposes of that act. The Lands Clauses Consolidation Act, 1845, and the Railway Clauses Consolidation Act, 1845, are incorporated with this special act.

The defendants proceeded to construct and execute the railway and works under the above acts. The railway, in its course, crosses the Uxbridge road nearly at right angles, and at and near this point it is constructed upon a viaduct of brick arches, and at a height of about nineteen feet above the level of the ground. This part of the railway was completed in or about the month of August, 1863, and the railway was opened for public traffic in the month of June, 1864.

The railway is not, and has never been worked by the defendants, who have never had any engines or carriages, but is, and since it was first opened for traffic always has been, run over and worked by the Great Western Railway Company, with their own engines and carriages, under the powers given by the special act. It is worked by them as a passenger railway only, and in the usual and ordinary manner.

Cumberland House is situate in the immediate neighbourhood of the railway, near the spot where the railway crosses the Uxbridge Road. No part of Cumberland House, and no lands of R. M. Piper, or of the female plaintiff, were ever entered upon, or taken, or used by the defendants, permanently or temporarily. The railway and works were commenced in the lifetime of R. M. Piper, and he was then residing there with his wife and family, and after his death the female plaintiff, his widow, continued to reside there with her family. She, after the death of R. M. Piper, and on the 19th of

1865

BRAND v. HAMMERSMITH AND CITY RAILWAY CO.

July, 1864, caused to be served on the defendants a notice stating that she claimed to be entitled to compensation from the company for damage and injury done, or caused to be done, and which would hereafter arise and be occasioned to her property by the exercise of the powers conferred on them by their several acts of parliament, in the course of, and in, and by the making and execution, by them, of the railway and of the works connected therewith, and by the working and use of the railway by them, and consequential thereon; and that the property in respect of which she claimed compensation was Cumberland House, with the buildings, garden, and land connected therewith and adjoining thereto, and that her interest in the property was that of tenant in fee in possession as trustee under the will of R. M. Piper, who, at the time of his death was seised in fee in possession of the property; and that she was also his executrix, and that, as such executrix, she also claimed compensation for damage and injury done, or caused to be done, to the property in the lifetime of R. M. Piper, and in the course of, and in, and by the making and execution by them of the railway, and of the works connected therewith, and that the amount of compensation she claimed as such trustee, in respect of her interest as such trustee, was 1500*l.*, and that the amount of compensation claimed by her as such executrix, in respect of the interest of R. M. Piper in his lifetime, was 100*l.*; and that she desired the questions of such compensation, respectively, to be settled by a special jury.

The defendants, within twenty-one days after the receipt of the notice, issued their warrant to the Sheriff of Middlesex, to summon a special jury.

The warrant, after the usual recital, set out the above notice, and continued: "And whereas we have not taken or used any part of the property or messuage called Cumberland House, buildings, garden, and land, and we do not admit that the same messuage and premises have been injuriously affected by the making and execution of the railway and of the works connected therewith, or by the exercise of the powers of any act of parliament vested in us, or that R. M. Piper, deceased, and M. C. L. Piper respectively have sustained any damage for which we are liable to make compensation under the said acts of parliament, and we altogether

dissent from the claim; but subject to and under protest we are willing to issue our warrant to summon a special jury, in order that the amount of compensation which we ought to make in respect of such of the matters, if any, as may be proved, and as under the acts of parliament we may be liable to make compensation for, may be settled, ascertained, and determined." The warrant then required the sheriff to summon a special jury "for the purpose of settling, ascertaining, and determining the sum or sums of money to be paid by way of compensation for the damage, if any, sustained by R. M. Piper, deceased, in his lifetime, or by M. C. L. Piper since his decease, by the messuage called Cumberland House, buildings, garden, and land having been and being injuriously affected by reason of the execution or construction of the railway and works authorized by the acts of parliament, or otherwise by the exercise of the powers by any act of parliament vested in us."

On the 13th of August, 1864, the claim of M. C. L. Piper was inquired of.

On such inquiry the claimant claimed compensation in respect of the following matters:—1. For the obstruction of light, and air, and way. 2. For damage to the garden by lime-dust and smoke in the course of construction of the railway in the lifetime of R. M. Piper. 3. That the working of the railway, and the running of trains over it after it had been constructed and opened for traffic, had occasioned, and always would occasion, vibration, noise, and smoke; and that the premises, by reason of their being subjected to such vibration, noise, and smoke from passing trains, were and always would be affected and further depreciated in value. Evidence was given on behalf of the claimant in support of each of these three heads of claim, and for the purpose of this case it is admitted that damage was caused to the claimant under the first two heads by the matters therein stated, and that the female plaintiff was entitled to the compensation assessed in respect of these two heads. As to the third head of claim, it did not appear that any structural injury was or would be caused to Cumberland House or any of its outbuildings by the construction of the railway. But it appeared, and is admitted for the purposes of this case, that by reason of the working of the railway, after it

1865

BRAND v. HAMMERSMITH AND CITY RAILWAY CO.

had been opened for traffic, the house and buildings were and would be subjected to vibration, noise, and smoke from passing trains, and were and always would be affected, and depreciated, and lessened in value thereby. The defendants objected to any evidence being given or received of any depreciation in value occasioned by these causes, and such evidence was admitted under protest. The defendants further objected that the female plaintiff was not entitled to any compensation under the third head of claim. By agreement the jury assessed the compensation under the several heads, the third being the amount claimed in the present action.

After verdict and judgment, but before suit, the plaintiff M. C. L. Piper intermarried with the plaintiff G. H. Brand.

The question for the opinion of the court is whether the plaintiff, Mary Christiana Louisa, is entitled to have compensation made to her by the defendants in respect of the matters falling under the third head of claim.

Nov. 17. *Hawkins, Q.C.* (*Dixon* with him), for the plaintiffs. The question is whether an injury to a house—not structural, but which lessens its value—caused by vibration which is created by the passing of trains in working a railway authorized by act of parliament, is or is not a subject of compensation, and whether it can be deemed to be an injurious affecting of land within the meaning of the Railway Clauses Consolidation Act. There is also another question, whether the defendants are liable, the injury complained of having been occasioned by their lessees and not by them.

As to the first point:

The claimant must establish that if this act had been done by a private individual he could have maintained an action, if he could not have maintained an action, no claim for compensation can be sustained. If the owner of the land which now belongs to the defendants had, while he was the owner, and without the authority of an act of parliament, constructed the railway and works, and had run trains so as, structurally or otherwise, to affect the house injuriously to the extent of lessening its value, an action would lie for the injury, but the right of action being taken away by the acts

of parliament, a claim for compensation is substituted for it. The section which is generally relied on, and which is said to confer the right to compensation, is section 68 of 8 & 9 Vict. c. 18; but that section has no bearing on the question; it merely points out the mode of procedure if the claimant is entitled to compensation. The question turns upon 8 & 9 Vict. c. 20. The preamble of that act states that it is expedient to comprise in one general act provisions usually introduced into acts of parliament, authorizing "the construction of railways;" when the whole of the act is considered, it will be found that those words do not mean only the actual construction, but the purposes to which the works are to be applied, and for which they are constructed. Section 6 is preceded by the heading, "and with respect to the construction of the railway, and the works connected therewith;" the word "construction" must receive an equally extended meaning; the section afterwards proceeds, "that the company shall make to the owners and occupiers and all other parties interested in any land taken or used for the purposes of the railway, or injuriously affected *by* the construction thereof," it does not say *in* the construction thereof, "full compensation for the value of the land so taken or used, and for all damage sustained by such owners or occupiers, and other parties by reason of the exercise, as regards such lands, of the powers by this or the special act, or any act incorporated therewith, vested in the company." By the 86th section the running of trains and the conveyance of passengers and goods is an exercise of the powers vested in the company; the claimant has sustained damage therefrom, and is entitled to full compensation. Moreover, under section 16 the legislature provides not only for the making of the railway, but also for the maintaining, repairing, and using; and the maintaining, repairing, and using a railway can be only after the railway is completed; and at the end of the section it is made compulsory upon the company to make full compensation to all parties interested, for all damage by them sustained by reason of the exercise of such powers, that is, the powres mentioned in the preceding portions of the section. It is easy to see the intention of the legislature in providing both for the making of the railway and for the using of it when made. In many cases, for instance, in the building of a limekiln, the injury

1865

BRAND v. HAMMERSMITH AND CITY RAILWAY CO.

from the actual construction may be nothing, but the injury arising by the construction of the works, that is the carrying out of the purposes for which they are constructed, may be very serious. Section 87 empowers the company to contract with the other companies for the use of their line. This act is a general act to be applied to all railways thereafter to be constructed. Without the act of parliament the company could not have purchased land, could not have used it so as to interfere with the substantial enjoyment of another's land, for if they had they might have been restrained in equity. They have power to construct the railway in such a manner as shall be convenient for use; but they want more, they require the power to run trains, and that is given them by section 86, and then the act provides, if in the exercise of any of these powers an injury accrues to other persons, the railway company shall be liable to make compensation. Here the injury is done by reason of the exercise of the powers authorized by the Railway Clauses Act, and the claimant is entitled to compensation. The 8 & 9 Vict. c. 18, ss. 18, 21, 38, shew the meaning of the legislature in using the words, "by reason of the execution of the works."

[LUSH, J. The language of 8 & 9 Vict. c. 18 differs from that in 8 & 9 Vict. c 20. It can hardly be said that the use of a railway after it is constructed, can be comprehended in the term "the execution of the works."]

If so, still sections 49 and 63 refer to compensation to be made by reason of lands being injuriously affected "by the exercise of the powers of this, or the special act, or any act incorporated therewith." The case finds that no structural injury was caused to Cumberland House or its buildings by the construction of the railway; but it is not necessary for the claimant to establish structural injury to entitle him to compensation: *Chamberlain* v. *West End of London and Crystal Palace Railway Company* (1) shews, if the house is injuriously affected, and is depreciated in value, it is a subject of compensation, though the house itself be not injured. In the present case the house is diminished in value substantially to the owner, who would be unable to let it again for the same rent it formerly produced. *Cameron* v. *Charing Cross*

(1) 2 B. & S. 605; 32 L. J. (Q. B.) 173.

*Railway Company* (1) is to the same effect. *Ricket* v. *Metropolitan Railway Company* (2) is distinguishable: there compensation was claimed in respect of the plaintiff's personal interest in his stock in trade, and not to his estate in land; and the court held the plaintiff was not entitled to compensation.

[LUSH, J. referred to *Moore* v. *Great Southern and Western Railway Company*. (3)]

The dictum of Lord Campbell, C. J., in *Penny and South Eastern Railway Company* (4) was not necessary to the decision of the case; compensation for damage caused by vibration could not have been recovered under that precept; but in *Glover* v. *North Staffordshire Railway Company* (5), where compensation was claimed for keeping gates shut at a spot where the railway crossed over a private road, and also because the railway was so constructed that the trains could not be seen until within seventeen seconds of the spot, Lord Campbell, C.J., says, "the land is depreciated in value . . . and the depreciation is caused by the erection of the gates, which are obstructions more or less, and I should say also by the liability of danger from the passing of the trains."

[MELLOR, J. That case has laid down the test, that an injury, which might be the subject of an action but for an act of parliament, would in consequence of an act of parliament be the subject of compensation; but neither judge nor counsel advert to what seems to be the dividing line—that is, an injury resulting from the execution of the works, and an injury resulting from carrying on the business of a railway.

LUSH, J. The test suggested is negative rather than affirmative; it is nowhere stated that every matter which would have been actionable would be a ground for compensation.]

Lord Cranworth guards himself against being so understood in *Caledonian Railway Company* v. *Ogilvy*. (6) *New River Company* v. *Johnson* (7), shews that where an action will lie, compensation is also claimable. In *London and North Western Railway Company* v. *Bradley* (8) the lessee of an inn and premises situate near the

(1) 16 C. B. (N. S.) 430; 33 L. J. (C. P.) 313. 10 Jur N.S. 635.

(2) 5 B. & S. 149; 34. L J. (Q. B.) 257. 11 Jur N.S 260

(3) 10 Ir. C. L. Rep. (N.S.) 46.

(4) 7 E. & B. 672; 26 L.J. (Q.B.) 232. 3 Jur N.S 957

(5) 16 Q. B. 912; 20 L. J. (Q. B.) 376.

(6) 2 Macq. 235.

(7) 2 E. & E. 435. 9 Jur N.S. 374.

(8) 6 Railway Cases, 551.

1865

BRAND v. HAMMERSMITH AND CITY RAILWAY CO.

tunnel of a railway was prevented by the vibration caused by the passing of the trains from keeping his beer in his cellar in a fit state for consumption, and the value of the house was alleged to be materially lessened by the consequent loss of custom. He gave notice to the company of his claim to compensation under the Lands Clauses Consolidation Act. The company obtained an injunction to restrain him from proceeding further, but the Lord Chancellor dissolved the injunction, and the inclination of his opinion was that the claim for vibration would be admitted. In *Croft* v. *London and North Western Railway Company* (1), an action was brought for an injury done by vibration after an award had been made by an arbitrator for compensation, and the Court held that the damage might have been foreseen, and was matter which might and ought to have been taken into consideration by the arbitrator, so the action would not lie; but the Court seemed to intimate that it was a matter for compensation and not for an action. In *Lee* v. *Milner* (2), the question of compensation for future damage is discussed. In *Stockport Timperley and Altringham Railway Company* (3) a claim was made in respect of an increased insurance, which the owner of a cotton mill, adjacent to a railway, had to pay for extra risk incurred by the danger from sparks emitted from the engines; the claim was allowed. No doubt in that case a distinction was taken between the premises being affected by something done on what had been the claimant's land and something done on the land of another; but *Chamberlain* v. *West End of London and Crystal Palace Railway Company* (4) is an authority that the distinction is not valid. If the land is injuriously affected, what difference can it make whether the injury results from something done on land purchased from another person or on that of the person injured?

[LUSH, J. The judgment of Crompton, J., in the case of the *Stockport Timperley and Altringham Railway Company*, (5) proceeded on the ground that exposing the cotton mill to the risk of fire was not actionable *per se;* but, inasmuch as the company took the land which was part of the cotton mill property, the jury, in

(1) 3 B. & S. 436; 32 L. J. (Q.B.) 113.
(2) 2 M. & W. 824.
(3) 33 L. J. (Q. B.) 251.
(4) 2 B. & S. 605; 32 L. J. (Q. B.) 173.
(5) 33 L. J. (Q. B.) 251.

estimating the compensation to be given for the severance of that part from the other part of the land, were at liberty to take into account that the part which was not taken would be exposed to greater risk by the severance than it was before.]

As to the second point. When the defendants were authorized to make the railway, they were also authorized to lease it and to take tolls. The company that construct the railway are the parties to pay the compensation. The persons leasing it are not liable, because the act of parliament legalizes the use of the railway. The words of the proviso, in section 16, are: "The company shall do as little damage as can be, and shall make full satisfaction;" and, by the interpretation clause, "The company" shall mean the company or party which shall be authorized by the special act to construct the railway. The company authorized to construct the railway are the defendants, and they are to pay for all damage done by reason of the exercise of the powers of these acts; they are, therefore, liable to make compensation.

Nov. 27. *Karslake, Q.C.* (*Horace Lloyd* with him), for the defendants. It is clear that no land of the plaintiffs is taken by the railway company; the alleged injury or annoyance is not caused by any negligence of the defendants; it is the necessary consequence of using locomotive engines on the railway; and this is authorized by statute. No easement is interfered with; and the compensation claimed is sought to be recovered from the defendants, who do not use the line. Under these circumstances, are the plaintiffs entitled to compensation for injury caused by vibration, smoke, and noise from passing trains after the construction of the railway? There is no express decision on the point; but the *dicta* to be found in the reported cases are all in favour of the defendants. The general rule is, that compensation is recoverable for an injury caused by an act which, but for the statutory powers conferred on the promoters of an undertaking, would be actionable; but for damage sustained only in common with the rest of the public, no compensation can be claimed; and it does not follow that, because an action will lie for an injury, the person suffering it will be entitled to compensation: *Caledonian Railway Company* v. *Ogilvy* (1); *Broadbent* v. *Imperial Gaslight Com-*

(1) 2 Macq. 229.

1865

BRAND v. HAMMERSMITH AND CITY RAILWAY CO.

*pany* (1), affirmed in the House of Lords. (2) *Reg.* v. *Pease.* (3) *Penny and South Eastern Railway Company* (4), instead of sanctioning the doctrine that compensation can be claimed in respect of annoyance caused by vibration, is an authority to shew that such an injury is not the subject of compensation. Lord Campbell, C.J., in his judgment, draws a distinction between an act which causes a deterioration of the property and one which injuriously affects the land; and Erle, J., states that injury to a house from concussion and vibration caused by the running of trains on the line after it has been completed, is not within section 68 of the Lands Clauses Consolidation Act. The legislature intended to give compensation only in cases where lands were taken or lands were injuriously affected. It is only right that where a man is compelled to part with his land, he should receive compensation for every depreciation which he suffers in respect of his remaining land; but so far as third persons are concerned, whose lands are not taken, if the legislature gives an express power to carry on that which may be a nuisance, they cannot claim redress. Houses along a line of railway may be greatly improved or greatly depreciated; but the owners are not entitled to compensation merely from the nuisance caused by running trains. In the present case no lands of the plaintiffs are taken, and the inconvenience which they suffer, they suffer with the rest of the public. In *Glover* v. *North Staffordshire Railway Company* (5), the defendants interfered with the enjoyment of an easement; therefore the lands of the plaintiff to which the easement attached were injuriously affected; and the depreciation in value was caused by the erection of gates at a spot over which the plaintiff had a right of way. In the case of *Stockport, Timperley, and Altringham Railway Company* (6), the claim for compensation was allowed because the company took some of the claimant's land, which they could not have done but for their act of parliament; and the depreciation in value, caused by the increased risk from fire, arose from acts done on the land which had been taken from the claimant; but if the railway had

(1) 7 De G. M. & G. 436; 26 L. J. (Ch.) 276.

(2) 7 H. L. C. 600.

(3) 4 B & Ad. 30.

(4) 7 E. & B. 660; 26 L.J. (Q. B.) 225.

(5) 16 Q. B. 912; 20 L. J. (Q. B.) 376.

(6) 33 L. J. (Q. B.) 251.

not taken the claimant's land, he would not have been entitled to compensation, because the company had done only that which every proprietor of land has a right to do. Suppose a person was the owner of three houses adjoining a field which was also his, and he entered into a treaty for the sale of the field with some one who required it to carry out some operations which might touch some spring, and so interfere with the supply of water to his houses; although no action will lie for the diversion of an underground spring, yet such a contingency might be provided for in the conditions of sale. A person may set up a school which may prove an annoyance to his neighbour, whose house and land may be lessened in value, but no action would lie against him; in like manner the owner of land may dedicate it as a highway, but no one ever heard that a person using the highway would be liable for a nuisance; residents on either side may be greatly inconvenienced, but they are bound to suffer and have no remedy. The injury or annoyance in such cases is merely personal; it is not similar to an injury caused by an obstruction to ancient lights, for in such case a right attached to land is interfered with. It is not every vibration that would give a cause of action; nor does it follow, that because it would be actionable, that a claim for compensation can be substantiated after the railway is made. Here no action will lie, because the running of locomotive engines is legalized, and compensation for the injury caused by vibration can only be, if at all, recovered under s. 68 of the Lands Clauses Act; and it appears from *Broadbent* v. *Imperial Gas Company* (1), that no compensation can be recovered for injuries of this nature, as it is impossible to estimate the extent and duration of the future mischief. The preamble of 8 & 9 Vict. c 18 shews that the act relates merely to the acquisition of lands required for public undertakings, and to the compensation to be made for the same. Section 18 applies only to those persons who are interested in the lands which it is requisite to purchase or take; and the notice to treat for the purchase, and as to the compensation to be made to all parties by reason of the execution of the works, is to be given to them only. The expression, lands injuriously affected, in s. 22, is limited to injuries done to lands of a

(1) 7 De G. M. & G. 436; 26 L. J. (Ch.) 276; affirmed in H. L., 7 H. L. C. 600.

1865

BRAND v. HAMMERSMITH AND CITY RAILWAY CO.

person, a portion of whose lands have been already taken under the statute; section 49 is limited to cases where lands have been taken, and a claim is made by the owner for compensation for damage to, and depreciation of, the rest of his property. There he is entitled to damage done by severance, because it is expressly given; but the section makes no allusion to injuries that may be done after the railway has been constructed. In section 63, no doubt a different expression is used, it is "by the exercise of the powers;" but that section like the preceding is confined to cases where damage accrues to a person whose lands are taken. Section 68 points out the mode in which compensation must be claimed, but applies to two cases only, viz.: where land has been taken, or has been injuriously affected by *the execution of the works.*

The plaintiffs rely on sections 6 and 16 of 8 & 9 Vict. c. 20; but the expression "they may do all other acts necessary for .... using the railway," does not refer to the actual working of the line, and merely authorizes all acts necessary to bring the line into a state in which it can be used. And this argument is fortified when reference is made to section 86, which authorizes the use and working of the railway. This section would be superfluous if the user of the line were authorized by section 16. The construction of the act must be the same whether the company who made the line use it, or whether it is leased to another company.

[LUSH, J. If compensation were allowed in such cases as this, where can the limit be placed? Lessees of turnpike tolls, hotel-keepers, and stage-coach proprietors may be seriously affected by the opening of a new railway—are they all entitled to compensation?]

Certainly not. A railway is a highway, in a limited sense, for use of locomotives. By section 92, the railway may be used by any one with properly constructed engines. The plaintiffs contend, that it makes no difference that the Great Western Company are committing the alleged nuisance; it would be a hard thing to hold that one company should be responsible for the acts of another. If this was the case of a reversioner he would have no claim against the company, for he could not maintain an action: *Mumford* v. *Oxford, Worcester and Wolverhampton Railway Company.* (1)

(1) 1 H. & N. 34; 25 L. J. (Ex.) 265.

*Dixon* was heard in reply.

1865

BRAND v. HAMMERSMITH AND CITY RAILWAY CO.

MELLOR, J. I am of opinion that our judgment must be for the defendants. The case has been ably argued on both sides, and many considerations have been put before us, on the part of the plaintiffs which are well worthy of attention, but they have failed to convince me that the plaintiffs are entitled to our judgment.

It appears to me that the only injury, in respect of which this disputed item of compensation was assessed by the jury is that caused by the exercise of the power of using locomotive engines upon a railway already constructed. The use of locomotives is an act expressly authorized, if it be done in the ordinary course of the business of the railway, without negligence; for I quite agree that if a railway company, authorized to use locomotive engines upon a railway already constructed, does exercise its powers in a negligent way, so as to cause injury, then an action will lie at common law. But the difficulty which the plaintiffs' counsel has to contend with is, to shew that under the terms of any of the acts of parliament, whether it be the Lands Clauses Consolidation Act, or the Railway Clauses Consolidation Act, or the special act, there is any compensation given in respect of an injury caused by the authorized use of the railway, and that, in point of fact, by the words of the various sections, and by the powers that are conferred on the railway company, the inconvenience and mischief, which no doubt the plaintiffs may have sustained, are not *damnum absque injuriâ*. One can well understand that there may be many reasons which might influence the legislature in authorizing the use of the railway by either one company, or two or three companies, with locomotive engines, so long as they use it properly and in the ordinary manner, and why the legislature should not subject the companies to any action for an injury, or an inconvenience necessarily resulting to a great number of persons. It would be almost impossible to construct a railway in the metropolitan district, or in any large town, without creating more or less inconvenience to a great number of persons; and it may be that the legislature may have thought that as to injuries resulting from the ordinary use and exercise of the powers conferred on railway companies to run locomotive engines, it was

1865

BRAND v. HAMMERSMITH AND CITY RAILWAY CO.

expedient to exempt railway companies from the multitudinous claims which might be made in respect of such injuries; and therefore the legislature may be supposed to have determined that private rights should yield to the public convenience. I quite agree that it may, in particular instances, work great hardship, and it may be that in this particular case hardship has been caused; but as I cannot find anything to show that the legislature has given compensation in respect of such an injury as that complained of, I must hold that the company were entitled to do all they have done without making compensation; for it is expressly stated in the case that the company used the railway in running passenger-trains in the usual manner, and without negligence.

Let us see with what object the Railway Clauses Consolidation Act and the Lands Clauses Consolidation Act were passed. They authorize companies to take land against the will of the owners of the land; but of course it would be a monstrous thing if they were not required to make compensation in respect of the taking of those lands, and also in respect of the injuries specially mentioned; such as for severance, by means of the execution of the works, of one portion of the land of an owner from another portion, or otherwise injuriously affecting such land.

This case is distinguishable from the *Stockport Timperley and Altringham Railway Company* (1), which was decided by Crompton, J., after mature consideration, and the distinction suggested seems to be a reasonable distinction, viz., that if a man's lands are injured, not only by the actual construction of an embankment, or a tunnel, or a cutting, but are injuriously affected by one part being severed from the other, and he is compelled to part with that land against his will, it may be very proper that he should be in a condition to say to the railway company, "You are going to take my land, you are going to apply it to a particular use which must prejudice the rest of my land, I therefore object to sell you the land under such circumstances." If the legislature thought fit to compel him to part with it under those circumstances, they no doubt contemplated giving him compensation with respect to the part not taken, although they may have withheld compensation from other persons who have no land touched

(1) 33 L. J. (Q. B.) 251.

or taken by the company for the purpose of constructing their works. However that may be, it appears to me, upon consideration, not now for the first time, but upon looking over the various clauses to which our attention has been very properly called, that we must read them as being confined to compensation to be made in respect of injury arising from the execution of the works of the railway, and not from the use of it. Therefore, what Lord Campbell, C.J., said in the case of *Penny and South Eastern Railway Company* (1), appears to be the true distinction. There are words at the end of the dictum, attributed to that very eminent judge, which were not necessary for the decision of that case; but it is perfectly clear the opinion of Lord Campbell, C.J., was, that the true distinction was between damage resulting from the execution of the works and damage resulting from the exercise of the powers conferred on railway companies when the works were constructed, such as using the railway by locomotive engines for the benefit of the public. It is clear that that was the distinction which Lord Campbell, C.J., had in his mind, and upon which Erle, C.J., then a member of this court, also in the same case expressed a similar opinion. Those opinions, it appears to me, are sound. And now that this case has undergone a full discussion, and every case which could be brought to our attention, as bearing upon the subject, has been cited, to induce us to come to a different conclusion, I am of opinion that the compensation which the statutes give is compensation only resulting from the execution of the works; and whether the words of the statute are "exercise of the powers" or "the execution of the works," it appears to me that they have the same meaning, and bear the same construction. A company, when it takes land, is required to give to the parties interested in such lands notice to treat; and they are required in that notice to state not only the particulars of the lands required but also the compensation to be made to all parties, by reason of the execution of the works. It is only on failure in complying with that notice, or, in the event of the parties not agreeing to the amount to be paid under the terms of that notice to treat, that the compensation clauses are to be invoked at all. I find in the Railway

(1) 7 E. & B. 669; 26 L. J. (Q. B.) 230.

1865

BRAND v. HAMMERSMITH AND CITY RAILWAY CO.

Clauses Act words which appear to me not at all to enlarge the compensation given by the Lands Clauses Act, and which must have the same interpretation. And, therefore, without going over the sections again, the conclusion at which I arrive is, that the claim to compensation is limited to damage resulting from the execution of the works; consequently, a claim for injuries which result from the carrying on of the business of the railway company, by running locomotive engines on the railway when constructed (if compensation can be claimed at all), can only be recovered in an action; and inasmuch as that is an act which is authorized by law to be done by the company, probably no action would lie. The present case itself affords an illustration of the difficulty which must lie in the way of the plaintiffs' contention. The present claim is not against the company who used the railway, and thereby caused the mischief, but against the company which constructed the railway. I only rely upon this fact by way of illustration, as I prefer to base my judgment on the construction of these acts as generally applicable to such injuries. I certainly should have been desirous to have found some clause which would give compensation in a case in which there was real injury; but I cannot hold that the plaintiffs are entitled to compensation without interfering with the powers which the railway companies have had conferred upon them by the legislature, as it appears to me, upon grounds easily reconcilcable with the interests of the public, and a desire not to inflict on railway companies an amount of penalty which might possibly prevent the increase of railways altogether. For these reasons I am of opinion that our judgment must be for the company.

LUSH, J. I am of the same opinion. The question here is whether the owner of a house adjacent to a railway, which house is subject to vibration, noise, and smoke, from passing trains, and is thereby depreciated in value, is entitled to compensation under the acts. The acts give compensation to two classes of persons—persons whose lands are actually taken for the purposes of the railway, and persons whose lands are not taken, but are injuriously affected at present by the making of the railway. With the first we have nothing to do. To what extent, and what particular items may be admissible in a claim by a person whose lands have been

taken, is a question not before us; and, therefore, I pass on to the other—the present being a claim for compensation by a person none of whose lands have been taken, but whose land has been injuriously affected.

The title to compensation must depend entirely on the language of the acts. It is to be observed, in relation to persons whose lands are injuriously affected only, and not taken, that the claim to compensation is subject to two important limitations. The one is that, with regard to the injury to land, the land must be injuriously affected in this sense—that the injury must be one for which an action would have lain, had the act of the company not been authorized by the statute. The second limitation is, that the land must be "injuriously affected by the execution of the works," which is the expression used in the Lands Clauses Act. The first limitation relates to the nature of the injury, and the second to the cause of it. As to the nature of the injury, the cases of *Chamberlain* v. *West End of London and Crystal Palace Railway Company* (1), and *Ricket* v. *Metropolitan Railway Company* (2), are illustrations. In the first case the owner of a house, which was depreciated in value by reason of the road being stopped up by a railway, and so the traffic access to the house diminished, was held entitled to compensation for the diminished value of the house. In the other case, the occupier of a house, whose trade had suffered by reason of the temporary stoppage of the road which led to the house, was held not entitled, because the value of the house was not diminished. As to the second limitation, the cause of injury, even if the lands were injuriously affected, the question is, are they injuriously affected by the execution of the works? That is the phrase made use of in the particular clause (section 68 of 8 & 9 Vict. c. 18), which provides the machinery for getting the compensation which the statutes give. The words "the execution of the works," in their ordinary and proper sense, mean nothing more than the construction of the railway; and, therefore, if it rested on this clause alone, the main part of the argument of the counsel on behalf of the claimant would fall to the ground. But recourse is had to the Railway Clauses Act, and other sections of

(1) 2 B. & S. 605; 32 L. J. (Q. B.) 173.
(2) 5 B. & S. 149; 34 L. J. (Q. B.) 257.

1865

BRAND v. HAMMERSMITH AND CITY RAILWAY CO.

the Lands Clauses Act, which contain a different form of expression; and, it is argued, that that form of expression shews that the compensation was not to be limited to injury sustained by the execution of the works, but to be extended to injuries sustained after the execution of the works, and while the railway was being used for the purposes for which the statutes authorized its construction. The 6th section of the Railway Clauses Act, on which that argument is based, is preceded by the following heading:—"And with respect to the construction of the railway and the works connected therewith." Therefore, one would suppose, the clauses which are about to follow that heading would be clauses relating to the construction of the railway, and would have no reference to the use of it afterwards. Section 6 then goes on to enact—"The company shall make to the owners and occupiers of, and all other parties interested in, any lands, taken or used for the purpose of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise, as regards such lands, of the powers by this or the special act, or any act incorporated therewith, vested in the company." Therefore, in that very same clause, the legislature uses the words, "by the construction thereof," as equivalent to, or synonymous with "by the exercise of the powers of the act." I apprehend that the meaning is clear. What was intended by that form of expression was no more than was intended by the form in the 68th section of the Lands Clauses Consolidation Act, viz.: the exercise of the power given to execute the works, that is, in the present case, to construct the railway; so that the compensation must be limited to such damage as was occasioned to the property by reason of the construction of the railway. All the damage which is caused to the claimant was damage occasioned, not by the construction of the railway, or by the execution of the works, but by the use of the railway for the purpose of the trains running upon it, which was the use legalised by the act of parliament. I am therefore of opinion that the claimant is not entitled to the compensation she seeks.

*Judgment for the defendants.*

[IN THE EXCHEQUER CHAMBER.]

## MORGAN *v.* THE VALE OF NEATH RAILWAY COMPANY.

1865
*Nov.* 27.

*Master and Servant—Negligence of fellow-servant—Common employment.*

The rule, which exempts a master from liability to a servant for injury caused by the negligence of a fellow-servant, applies in cases where, although the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts that it must be included in the risks which have to be considered in his wages.

Thus, whenever an employment in the service of a railway company is such as necessarily to bring the person accepting it into contact with the traffic of the line, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to such employment, and within the rule.

The plaintiff was in the employment of a railway company as a carpenter, to do any carpenter's work for the general purposes of the company. He was standing on a scaffolding at work on a shed close to the line of railway, and some porters in the service of the company carelessly shifted an engine on a turn-table so that it struck a ladder supporting the scaffold, by which means the plaintiff was thrown down and injured:—

*Held*, on the above principle, that the company were not liable.

APPEAL from the decision of the Court of Queen's Bench, discharging a rule to set aside a nonsuit and enter a verdict for the plaintiff.

The declaration stated that the plaintiff was lawfully employed doing repairs to an engine-shed of the defendants, and that the defendants, by their servants, so negligently, improperly, and unskilfully managed an engine of the defendants, which was being turned on a turn-table close to the shed, that the steam-engine was driven against and struck a ladder, by which the scaffolding on which the plaintiff was standing was in part supported, and caused the scaffolding to fall, and the plaintiff to be thrown to the ground, whereby, &c.

Plea, not guilty

On the trial, before Wilde, B., at the Glamorganshire Summer Assizes, 1863, it appeared that the plaintiff was a carpenter, and in December, 1862, was in the employment of the railway company at weekly wages. The duties of the carpenters in the em-

1865

MORGAN v. THE VALE OF NEATH RAILWAY CO.

ployment of the company are to perform all carpenter's work they may be directed to do by the inspector of the line for the general purposes of the company. On the 23rd of December the plaintiff was employed by the defendants to do certain carpenter's work on the roof of an engine-shed situate at the Neath Station of the defendants' railway, for which purpose it was necessary that a scaffold should be erected near a turn-table, on and by means of which the defendants' engines and carriages were moved and turned by their porters and servants. The scaffold was erected in the proper position to enable the plaintiff to do the work, and was in all respects proper and sufficient as regards materials and construction for the purposes for which it was required. The plaintiff had mounted the scaffold, and was standing on it doing his work as a carpenter on the roof of the shed, when some porters employed by the defendants, who were engaged in shifting a locomotive engine by means of the turn-table, allowed the engine to project so far beyond the table that, in turning the engine, the end of it struck against and displaced a ladder which was one of the supports of the scaffold. The scaffold gave way, and the plaintiff was thrown from it to the ground, and received severe bodily injuries. The occurrence was caused solely by the negligence and carelessness of the defendants' servants in the management of the engine and turn-table, and was not in any way attributable to contributory negligence on the part of the plaintiff or of any other persons.

It was objected on the part of the defendants that the plaintiff and the persons through whose negligence the injury was caused being alike the servants of the company, and the injury having occurred when they were severally engaged in doing the company's work, the defendants were not liable. On behalf of the plaintiff it was contended that he and the servants who caused the injury were engaged in different operations and distinct departments of work, and that there was no such community of employment between him and those servants as to exempt the defendants from liability for the negligent act which caused the injury.

The learned judge nonsuited the plaintiff, giving him leave to move to enter a verdict for the agreed sum of 250*l*.

A rule having been afterwards obtained accordingly, on the ground that there was no such common employment as to exempt

the defendants from liability, cause was shewn in Easter Term, 1864, and after time taken to consider, the Court of Queen's Bench discharged the rule. (1)

*Macnamara* (*G. B. Hughes* with him) for the appellant, the plaintiff. It is now finally decided by the House of Lords that a master, in the absence of personal negligence, is not liable for the negligence of his servant causing injury to a fellow-servant. The ground of this exception to the general liability of a master for the acts of his servant, is that the risk of injury from the negligence of those engaged at work with him is contemplated by the servant when he enters the service, and that he undertakes the risk as incident to his employment. It is not enough, therefore, that the injured person and those causing the injury are in the service of the same master; they must be actually engaged upon common work. This is the criterion laid down; and in all the cases in which the master has been held not liable, the servants have clearly been so engaged. In the leading case on the subject, the *Bartonshill Coal Company* v. *Reid* (2), Lord Cranworth throughout restricts the exception to the case of servants engaged "in a common work" (pp. 276, 282, 284), or in "a common occupation" (p. 277), or of "fellow-workmen" (p. 284); and (p. 293) he approves of the judgment of the Lord President in *Gray* v. *Brassey* (3), as in accordance with the doctrine of the English cases, in which the Lord President said, he "considered the question to turn on what is to be regarded as common service; it was not enough that the servant injured and the servant causing the injury should be servants of the same master; they must be engaged *in the same work*." The learned Lords who took part in *Reid's* case (2), and in *Bartonshill Coal Company* v. *M'Guire* (4), which was in effect the same case, concurred in this view. Thus Lord Chelmsford, C. (p. 307), after pointing out the difficulty of defining common service or common employment, says: "It is necessary, however, in each particular case to ascertain whether the servants are fellow-labourers *in the same work*. When servants

(1) See the case reported in the court below, 33 L. J. (Q. B.) 260; 5 B. & S. 570. 10 Jur. (N.S.) 1074

(2) 3 Macq. 266.

(3) 15 Court of Ses. Cas. (2nd S.) 135.

(4) 3 Macq. 300.

1865

MORGAN v. THE VALE OF NEATH RAILWAY CO.

are engaged in different departments of duty, an injury committed by one servant upon the other, by carelessness or negligence in the course of his peculiar work, is not within the exception." And after stating the facts in *M'Naughton* v. *Caledonian Railway Company* (1), which are very like the present, Lord Chelmsford, C. (at p. 311), said that the decision, holding the master liable, might be sustained without conflicting with the English authorities, on the ground that the workmen in that case were engaged in totally different departments of work, the deceased being a carpenter who was engaged in repairing a railway carriage, and the persons whose negligence caused his death being an engine-driver and the person who turned the switches. A review of the English cases will shew that in every instance in which the master has been held responsible, the servants have been, at least for the time, engaged on common work, with a common object. Whereas nothing can be more distinct than a carpenter's work on a shed and that of porters engaged in arranging the traffic of the line. There is no connection between the two beyond the fact that they were both in the employ of the same company.

[PIGOTT, B. Would it have made any difference if the plaintiff had been engaged at work on the turn-table?]

Possibly it might not. *Priestley* v. *Fowler* (2), which is the first case on the subject, is put by Lord Cranworth, and by Lord Chelmsford, in the above cases (3), as an instance of servants engaged in a common work; and the judgment also partly proceeds on the ground of the plaintiff having knowledge or means of knowledge that the van, which broke down and caused the injury, was overloaded; it is, therefore, clearly distinguishable from the present case. In *Searle* v. *Lindsay* (4), the means of knowledge on the part of the plaintiff was also relied upon by Keating, J. *Hutchinson* v. *York, Newcastle, and Berwick Railway Company* (5), and *Waller* v. *South Eastern Railway Company* (6), in deference to which Cockburn, C. J., concurred in giving judgment for the de-

(1) 19 Court of Ses. Cas. (2nd S.) 271.

(2) 3 M. & W. 1.

(3) See 3 Macq. pp. 284-5 & 307.

(4) 11 C. B. (N.S.) 429; 31 L. J. (C. P.) 106.

(5) 5 Ex. 343; 19 L. J. (Ex.) 296.

(6) 2 H. & C. 102; 32 L. J. (Ex.) 205.

fendants in the court below, are also distinguishable. In the first case, all parties were engaged in the common object of working the train; and so, in the other case, the plaintiff, the guard of the train, and the platelayer were both employed in furthering the immediate object of the transit of the train. That is the ground upon which Pollock, C.B., based his judgment, and in which Bramwell, B., concurred: viz., that the servants, at the time of the accident, were engaged in *one common object.*

[BRAMWELL, B. But the question is, whether or not it need be a common *immediate* object; see *Wiggett* v. *Fox.* (1)

POLLOCK, C.B. It may be observed that the Chief Justice's judgment in the court below seems to make no distinction between a carpenter regularly employed to do work on the railway, and one employed only for a casual job.]

The risk of incurring damage from the negligence of a fellow-servant depends on whether the employment of the two must necessarily bring them together, as pointed out by Wilde, B., in *Waller* v. *South Eastern Railway Company* (2), who says that the risk as to the condition of the rails was a risk incident to the employment of a guard in a train running over the rails. In *Holmes* v. *Clarke* (3), the master was himself guilty of negligence; but Byles, J., says: "Why may not the master be guilty of negligence by his manager, or agent, whose employment may be so distinct from that of the injured servant, that they cannot with propriety be deemed fellow-servants?" *Lovegrove* v. *London, Brighton, and South Coast Railway Company* (4), is undistinguishable from *Waller* v. *South Eastern Railway Company.* (5) Finally in *Senior* v. *Ward* (6), Lord Campbell, C.J., confines the irresponsibility of the master in the way now contended for: "According to the authorities, the action would not have been maintainable if the deceased had come to his death purely from the negligence of his fellow-servant, employed on the same work with him." If that is the true criterion, the present case does not come within it, and

(1) 11 Ex. 832; 25 L. J. (Ex.) 188.

(2) 2 H. & C. at p. 109; 32 L. J. (Ex.) at p. 208.

(3) 31 L. J. (Ex.) at p. 361; 7 H. & N. at p. 949.

(4) 33 L. J. (C. P.) 329; 16 C. B. (N.S.) 669.

(5) 2 H. & C. 102; 32 L. J. (Ex.) 205.

(6) 1 E. & E. at p. 391; 28 L. J. (Q.B.) at p. 142.

1865

MORGAN v. THE VALE OF NEATH RAILWAY CO.

the defendants are liable. It may be as well to observe that the American case of *Farwell* v. *Boston and Worcester Railroad Corporation* (1), is not inconsistent with this view, although Shaw, C.J., uses expressions going further, but they were unnecessary to the decision of the case. No doubt, the tendency of the American courts has been to relieve the master in all cases from liability for injury arising from negligence of a fellow-servant; while the Scotch courts have proceeded on the opposite principle; and the English courts, as affirmed by the House of Lords, have taken an intermediate course, holding the master exempt only where the servants are employed together on the same work; which, in the present case, they were not.

*H. S. Giffard, Q.C.* (*Lanyon* with him), was not heard for the defendants.

ERLE, C.J. I am of opinion that the judgment should be affirmed. The plaintiff was employed by the railway company to do carpenter's work, and he was so employed on the line of railway, and the wrongdoers were the porters also in the employment of the company, who, in shifting a steam engine on a turn-table close to the shed on which the plaintiff was working, managed the business so negligently that the engine struck against the ladder which partly supported the plaintiff's scaffolding, and threw the plaintiff violently to the ground. The plaintiff and the porters were engaged in one common employment, and were doing work for the common object of their masters, viz., fitting the line for traffic. On a suggestion put by my brother Pigott, Mr. Macnamara was driven to an answer, which (if it did not admit that it was the same thing) shewed that he had difficulty in establishing any distinction whether the plaintiff were working close by, or whether he were employed on the turn-table itself. I think it can make no difference; and the rule which exempts the master from liability to a servant for injury caused by the negligence of a fellow-servant applies. The principle on which this rule was established, as applicable to the present case, is very clearly put by Blackburn, J., in the judgment to which Mellor, J. agreed in the court below (2): "There are many cases where the immediate

(1) 4 Metcalf, 49; the judgment is also given in 3 Macq. 316.

(2) See 5 B. & S. 580; 33 L. J. (Q. B.) 265.

object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which are to be considered in his wages. I think that, whenever the employment is such as necessarily to bring the person accepting it into contact with the traffic of the line of a railway, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to such an employment, and within the rule." The cases on this subject are extremely numerous, and have been closely examined, both here and in the court below, and I could not make the matter clearer by going through them. It is sufficient to say that I entirely agree with the judgment of the court below, that the facts of the case bring it within the rule exempting the master from liability.

POLLOCK, C.B. I only wish to add a single sentence. It appears to me that we should be letting in a flood of litigation, were we to decide the present case in favour of the plaintiff. For, if a carpenter's employment is to be distinguished from that of the porters employed by the same company, it will be sought to split up the employés in every large establishment into different departments of service, although the common object of their employment, however different, is but the furtherance of the business of the master; yet it might be said, with truth, that no two had a common immediate object. This shews that we must not over refine, but look at the common object, and not at the common immediate object.

WILLES, BYLES, and KEATING, JJ., and BRAMWELL, CHANNELL, and PIGOTT, BB., concurred.

*Judgment affirmed.*

Attorneys for plaintiff: *Hollings, Sharp, & Ullithorne.*
Attorney for defendants: *E. Doyle.*

[IN THE EXCHEQUER CHAMBER.]

1865
*Nov.* 28.

## POLDEN *v.* BASTARD.

*Will—Devise—Words "as now in the occupation of A"—Easement.*

A testatrix, at the date of her will, was the owner of two adjoining houses and premises; she occupied one herself, in the yard belonging to which was a pump, the other house was and has been for some time occupied by T. A., as her tenant, and he, with the knowledge of the testatrix, had been accustomed to go into the yard and draw water from the pump for the use of his house, there being no water supply on his premises. Under a devise of this house "as now in the occupation of T. A.":—

*Held*, that the right to the use of the pump did not pass.

APPEAL from the decision of the Court of Queen's Bench, making a rule absolute to enter a verdict for the plaintiff. (1)

Declaration for breaking and entering the plaintiff's close and carrying away water.

Plea, that Rachael Polden Bonnel was seised in fee of the close in which &c., and of a pump and well therein, and of a certain dwelling-house, outhouse, and garden; that by her will she devised to Clementina Polden and her heirs for ever the house, outhouse, and garden, together with a way on foot from the house, outhouse, and garden, over the close of the plaintiff to the pump and well and back again, for the purpose of taking water from the pump and well, for the more beneficial use and enjoyment of the house; that C. Polden became seised in fee of the house, outhouse, and garden, with the appurtenances, together with the right and easement devised by the will to her, and by deed assigned to the defendant the house, outhouse, and garden, with the appurtenances, together with the right and easement; that the defendant became seised in fee thereof; that one Dennis was in occupation of the premises, the reversion being in the defendant, and that the defendant committed the trespasses for the preservation of his reversionary estate.

Issue taken thereon.

The cause was tried before Williams, J., at the Dorsetshire Summer Assizes, 1862, when the following facts were proved:

Rachael Polden Bonnel, at the time she made her will, and up

(1) See the report of the case in the court below, 32 L. J. (Q. B.) 372; 4 B. & S. 258.

to her death, was seised in fee, and was in the occupation of a dwelling-house with a yard attached, in which yard was a well and a pump, the yard being the close mentioned in the pleadings as the close of the plaintiff; she was also seised in fee of another dwelling-house, outhouse, and garden, which adjoined the other, and which are the premises mentioned in the plea as devised to C. Polden.

On the 26th of May, 1834, R. P. Bonnel made her will, the material part of which is as follows:—

"I give to my nephew Robert Baker Polden all that my freehold cottage and garden at Charlton Marshall, now occupied by William Wills, to him and his heirs and assigns for ever. To my nephew William Polden (the plaintiff) I give the house I now live in, with the outhouse, garden, and orchard, in my own occupation, to him and his heirs and assigns for ever, and also the sum of 10*l*. I give to my niece Clementina Polden, the house and outhouse, and garden, as now in the occupation of Thomas Answood, junr., to her and her heirs and assigns for ever."

Some time before and at the time that R. P. Bonnel made her will, Thomas Answood, junr., was in the occupation of the dwelling-house, orchard, and garden, as her tenant, and during the time of his occupation, he, with her knowledge, used a way on foot from his dwelling-house and garden into the yard attached to the other dwelling-house to the well and pump, for the purpose of taking the water required for the use of himself, his family, and for domestic purposes. He had no supply of water on his own premises, and there was no source from which he could obtain any water, except from the well and pump, as the testatrix knew. But he might have obtained drinking water by digging a well from 18 to 20 feet deep on the premises occupied by him, or water from a river 150 yards off, which was used for brewing, but which T. Answood, who was a witness at the trial, said he should not like to drink.

R. P. Bonnel died in May, 1848, and since her death the plaintiff has occupied the property devised to him.

In September, 1849, C. Polden conveyed the house, &c., devised to her, together with all rights, privileges, &c., thereunto belonging, to the defendant. Since the making of the will, the tenants of

1865

POLDEN v. BASTARD.

this house, &c., until October, 1861, enjoyed the use of the water from the well and pump in the same manner and for the same purposes as T. Answood, but since that time, the plaintiff has, by means of a fence, &c., prevented any access to the pump by Dennis, the occupier of the defendant's house, and the defendant broke down this fence as mentioned in the plea.

The learned judge directed a verdict for the defendant, reserving leave to enter a verdict for the plaintiff with 40*s.* damages, if the Court should be of opinion that the right to use the pump did not pass under the devise to C. Polden.

A rule *nisi* having been obtained accordingly, in Trinity Term, 1863, the court of Queen's Bench made it absolute. (1)

*E. E. Kay*, (*Kingdon* with him) for the defendant. It is necessary first to consider the position of the testatrix at the time she made her will. She was possessed of two houses, the curtilage of one house adjoined the curtilage of the other; the testatrix occupied the house with a yard, in which the well and pump were, and the other house was then in the occupation of her tenant Answood, who used the well and pump in the yard belonging to the other house, with the knowledge of the testatrix; and, as she also knew, there was no source from which the tenant could obtain any water except from the well and pump. In this state of things, the testatrix makes her will. After devising to R. Polden a cottage and garden now occupied by W. Wills, and a house in her own occupation, to the plaintiff, "she gives to her niece C. Polden the house and outhouse and garden, as now in the occupation of Answood, to her and her heirs." There is a difference in the language used in the devise to R. Polden and in that to C. Polden; in the former, it is "the cottage now occupied by Wills," in the latter, it is the cottage "as now in occupation of Answood." By the well-known rule of construction, no words in a will shall be rejected, unless it is impossible to give them any meaning; contrasting the words of these two devises, the words "as now" are of importance. If Answood, instead of using the well and pump had used the whole yard, and had exclusive use of

(1) See the report of the case, in the court below, 32 L. J. (Q.B.) 372; 4 B. & S. 258.

the yard with the full knowledge of the testatrix, under words like these, the yard would have passed; if the yard would pass, something less than the yard, a right or privilege over the yard passes. The house is devised to C. Polden "as now occupied by Answood," that is, with all the incidents and enjoyments attached to it, the right to go to the well and pump therefore passed. Suppose a lessor agreed to grant a lease of certain premises "as now occupied by me," and the right of getting water from an adjoining yard was a privilege enjoyed by the lessor, could it be doubted that he intended to grant the right of taking water from the well? The meaning of the testatrix is, I wish the object of my bounty to have the house with all the material benefits enjoyed by Answood. In *Bodenham* v. *Pritchard* (1), the devise was of a mansion, together with all lands thereunto belonging, with the appurtenances "as enjoyed by me," and it was held that these latter words extended the words of description. In *Press* v. *Parker* (2), the devise was to R. P. "all my freehold messuage wherein he now lives," and to A. P. "all my freehold messuage now in the occupation of E." A coal-cellar was within the boundary of the messuage occupied by E., but had always been used with the messuage in which R. P. lived: it was held that the cellar passed to R. P. In *Doe* v. *Collins* (3), the testator was possessed of a house, stables, coal-pen, and garden. The words of the bequest were "I give the house I now live in and garden to B.:" it was held that the stables and coal-pen passed to B.

Secondly, the mere devise of the house carries with it the right to go and take water from the well. Easements to pass, on a severance of an heritage, by implied grant, must be continuous and apparent easements, without which the enjoyment of the several portions could not be had: *Gale on Easements*, p. 81. In *Pyer* v. *Carter* (4) it was held, that where the owner of two houses conveys one to a purchaser, the purchaser would be entitled to the benefit of all drains used with the house, and that the right to use drains was an apparent and continuous easement. Here the privilege is quite apparent, more so than in that case. It was also

(1) 1 B. & C. 350.
(2) 2 Bing. 456.
(3) 2 T. R. 498.
(4) 1 H. & N. 916; 26 L. J. (Ex.) 258.

1865

POLDEN v. BASTARD.

urged, in *Pyer* v. *Carter* (1), that the easement was not one of necessity, as, by a small expenditure, the plaintiff might have drained directly from his own land into the common sewer, but the court said that the amount to be expended in the alteration of the drainage, or in the construction of a new system of drainage, ought not to be taken into consideration; this disposes of the objection, that the easement is not one of necessity, because the defendant might dig a well in his own premises.

[BRAMWELL B. *Pyer* v. *Carter* has been treated as a case of no authority (2).]

In *Ewart* v. *Cochrane* (3) Lord Campbell laid it down that, upon a severance of two properties, anything which was used, and was necessary for the comfortable enjoyment of the part granted, shall be considered to follow from the grant; *Hall* v. *Lund* (4) is to the same effect. If, then, this is a privilege connected with, and necessary for, the comfortable and convenient enjoyment of the premises, it would pass under the words of the will. The right to go to the plaintiff's yard and to the well and take water from it, is such a privilege, and it therefore passes to the defendant under the devise.

*The Solicitor-General* (*H. T. Cole* with him), for the plaintiff, was not called upon.

ERLE, C. J. I am of opinion that the judgment of the court below ought to be affirmed. The testatrix was, at the time of making her will, possessed of two houses, which she devised to two separate devisees. It appears that, at the time, and for some time before the testatrix made her will, the then occupant of one of the houses was in the habit of going to the pump on the premises of the other house, which was occupied by the testatrix herself, for the purpose of taking water. The devise was, "I give to my nephew, W. Polden, the house I now live in, with the outhouse, garden and orchard in my own occupation. I give to my niece, C. Polden, the house, and outhouse, and garden, as now in the occupation of T. Answood." The house occupied by Answood was the dominant,

(1) 1 H. & N. 916; 26 L. J. (Ex.) 258.
(2) See *Suffield* v. *Brown*, 33 L. J. (Ch.) at p. 259.
(3) 4 Macq. at p. 122.
(4) 1 H. & C. 676.

1865

POLDEN v. BASTARD.

and the yard and well of the other constituted the servient tenement. The question is, will the words of the will, "the house as now in the occupation of T. Answood," carry with it the right to go to the pump on the adjoining premises and take water? I think they will not. In construing wills a construction has been put on the word "enjoyed," so as to make it a term of general description, and it has been sometimes held to pass any benefit which has been possessed by the occupier of the premises devised; but our judgment must proceed on the particular words used, which are, "the house, outhouse, and garden, as now in the occupation of Answood." This is simply a specific description of the property devised. There is a distinction between easements, such as a right of way or easements used from time to time, and easements of necessity or continuous easements. The cases recognise this distinction, and it is clear law that, upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass, unless the owner, by appropriate language, shews an intention that they should pass. This right to go to a well and take water is not a continuous easement, nor is it an easement of necessity. On both these grounds I think the judgment of the court below must be affirmed. I would add, with regard to the case of *Bodenham* v. *Pritchard* (1), that the devise was of a mansion, "together with all the buildings and lands thereunto belonging, as now enjoyed by me;" but there are no such words in the present case. If the language of this will had been, "I devise the house as now *enjoyed* by Answood," then *Bodenham* v. *Pritchard* (1) might be an authority for the defendant.

10 Q.B. 364

6 C.L. 173.

10 Q.B. 364.

POLLOCK, C.B., WILLES, BYLES and KEATING, JJ., BRAMWELL and PIGOTT, BB., concurred.

*Judgment affirmed.*

Attorney for plaintiff: *R. Jones.*

Attorneys for defendant: *J. E. & A. Fox.*

(1) 1 B. & C. 350.

[IN THE EXCHEQUER CHAMBER.]

1865
*Nov.* 28.

## WILSON *v.* RANKIN.

*Ship—Marine Insurance—Deck Cargo—Certificate of Clearance*—16 & 17 *Vict.* c. 107, *ss.* 170, 171, 172—*Illegal Act of Master—Privity and Liability of Owner.*

The plaintiff, the owner of a ship, effected a policy on freight from a British port in North America to Liverpool. The ship sailed with a cargo of timber between the 1st of September and the 1st of May. The master, without the knowledge or privity of his owner, stowed a portion of the cargo on deck, and sailed without any certificate from a clearing officer that the whole cargo was below deck, contrary to 16 & 17 Vict. c. 107, ss. 170, 171, & 172. On a loss by perils insured against:—

*Held*, that although the master had general authority from his owner to stow the cargo, no authority could be implied to load it so as to violate the statute, neither was it an act of the master which the owner must be presumed to have assented to; that the fact of the ship having sailed without the certificate did not render her unseaworthy at the commencement of her voyage so as to prevent the policy attaching; and, consequently, that the plaintiff was not precluded from recovering against the underwriter.

Error from the judgment of the court of Queen's Bench, in favour of the plaintiff on demurrer to a plea.

Declaration on a policy of insurance, by which the plaintiff caused himself to be insured at and from Restigouch to Liverpool, upon any kind of goods, in the ship called the *Jane*; the ship, goods, and merchandizes, &c., for so much as concerned the assured, by agreement between the assurers and assured, should be valued at 1400*l.* on freight, and valued thereat, and it was declared that the insurance was against perils of the seas and all other perils, losses, and misfortunes that should come to the hurt, detriment, or damage of the goods and merchandizes and ship, or any part thereof, and which are usually covered by marine insurance: and that the defendant, for a certain premium paid to him by the plaintiff, subscribed to the policy for 80*l.*, and became an insurer thereon to the plaintiff for that amount, on freight valued as aforesaid; that certain goods were shipped on board the vessel at Restigouch, to be carried as cargo on the voyage in the policy described, for certain freight payable to the plaintiff, and afterwards the ship, with the cargo on board thereof, sailed on the

voyage, and during the continuance of the risk to the ship, cargo, and freight, were, by the perils of the sea and the perils insured against, wholly lost; that the plaintiff was at the time of the loss interested in the freight to the amount insured by him; that all conditions have been fulfilled, and that the defendant has not paid the sum of 80*l.* to the plaintiff.

Fourth plea, that the policy of insurance was made, and the cargo, the freight in respect of which was insured, was shipped on board the ship after the passing and coming into operation of the 16 & 17 Vict., c. 107, and that the cargo consisted of timber and wood goods, and that Restigouch in the policy mentioned was and is a British port in North America, and that the ship, with the cargo, cleared out and sailed from Restigouch after the 1st of September, 1861, and before the 1st May, 1862, to wit on the 13th November, 1861, and that the whole of the cargo was not below deck, but the master of the ship caused to be placed, and to remain, and be upon, and above the deck of the ship, part of the cargo, contrary to the statute; and that at the time of the ship sailing, the master of the ship had not obtained from the clearing officer any certificate that the whole of the cargo of the ship was below deck, contrary to the statute; and that the plaintiff was the owner of the ship, and the freight insured was payable to him as such owner in respect of the said cargo.

Demurrer and joinder. Upon which the court of Queen's Bench gave judgment for the plaintiff. (1)

Nov. 27. *Cohen* (*Mellish, Q.C.*, with him), for the defendant, the plaintiff in error. The underwriter is not liable, because the voyage is illegal; first, by reason of a portion of the cargo having been stowed on deck; secondly, by reason of the master not having obtained a clearance certificate in conformity with s. 170 of 16 & 17 Vict., c. 107. *Cunard* v. *Hyde* (2) decides that the violation of the provisions of 16 & 17 Vict., c. 107, ss. 171, 172, renders the voyage illegal, so that if the shipowner intended these provisions to be violated on the voyage, he could not recover the freight insured on such a voyage. It is true that the previous

(1) See the case reported in the Court below, 34 L. J. (Q.B.) 62.

(2) 2 E. & E. 1; 29 L. J. (Q.B.) 6.

1865

WILSON v. RANKIN.

case of *Cunard* v. *Hyde* (1) decides that the owner of goods can recover an insurance on goods which are stowed without his knowledge in contravention of the provisions of the statute. But the master does not stand in the same relation to the owner of the goods as he does to the shipowner; he is a stranger to the former but he is the agent of the latter. Several cases shew that when the master has been guilty of an illegal act, the policy is void as against the shipowner, but not as against the owner of goods. In *Bell* v. *Carstairs* (2), an American ship, insured in England, was captured by a French ship for want of certain documents she ought to have been furnished with by a treaty between France and America, and it was held the insurance on the ship was void; but in *Dawson* v. *Atty* (3), the court drew a distinction between the case of an insurance on ship and on goods, because the owner of the goods had no concern in obtaining the proper documents with which the vessel was to be furnished for her voyage, but in a policy on ship the ship is bound to have such documents on board. *Freard* v. *Dawson* (4), *Keir* v. *Andrade* (5), *Stuart* v. *Powell* (6), shew that the omission of the master to comply with the requirements of a statute makes the voyage illegal; the shipowner could not in such case take advantage of the illegal act of his agent and recover the freight; neither ought he to be allowed to recover in this action, and so receive the fruits of the illegal act of his agent. In *Smith's Mercantile Law*, p. 158, it is said that the principal is liable for the deliberate fraud of his agent committed in the execution of his employment, though without the principal's authority; and in *Udell* v. *Atherton* (7), the court were equally divided on the question whether the principal was liable for the fraud of his agent. It is not necessary here to argue whether a shipowner can take advantage of the fraud of his agent; it is sufficient that he cannot take advantage of his illegal acts. It is said in the court below (8), on the authority of *Earle* v. *Rowcroft* (9), that the master is not the agent of the shipowner to violate the law. But suppose a clerk, having a general

(1) E. B. & E. 670; 27 L. J. (Q.B.) 408
(2) 14 East, 374.
(3) 7 East, 367.
(4) Marshall on Insurance, 136.
(5) 6 Taunt. 498.
(6) 1 B. & Ad. 266.
(7) 7 H. & N. 172; 30 L.J.(Ex.) 337
(8) 34 L. J. (Q.B.) 62.
(9) 8 East, at p. 133.

authority to sell on behalf of his principal, sells goods for the purpose of smuggling them, could the principal recover the price? On the ground of public policy he ought not to be allowed to recover. The question is not whether an action will lie against the shipowner on account of the illegal act of the master, but whether the shipowner can take advantage of the illegal acts? Secondly, the policy is void because the ship was not seaworthy at the commencement of the voyage. By the stowage of the cargo on deck the risk is increased, it might lead to the loss of the vessel, and the underwriters might have been entitled to a higher premium if they knew that the cargo was a deck cargo. The ship must be seaworthy at the commencement of her voyage, and the parties are to be considered as contracting with reference to what is usual and of course in the transaction which is the subject of the policy: *Burgess* v. *Wickham*. (1) When the legislature has enacted that certain things shall be done, the ship is not seaworthy if the provisions of the statute be violated, and here there was an implied warranty that the provisions of the 16 & 17 Vict., c. 107, were not violated, and that the ship would not sail without a certificate.

Nov. 28. *Brett, Q.C.* (*Millward, Q.C.*, and *Crompton* with him) was not called upon for the plaintiff.

ERLE, C.J. This was an action upon a policy on freight. By the plea it appeared that the master of the vessel had, in the month of November, placed some timber, which he was carrying from Restigouch, a British port in North America, to Liverpool, as part of the cargo, on deck, contrary to the 16 & 17 Vict., c. 107. It is clear that if Wilson, the shipowner, had done this or had been cognizant of it according to the second case of *Cunard* v. *Hyde* (2), it might have been an illegal voyage, and his insurance thereon might have been rendered void. But in the present case it is not shewn that the owner knew that the timber was to be carried as a deck cargo, nor was he in any way personally a party to the transaction. The judgment of the court below, was, that by reason of knowledge and authority not having been shewn to

(1) 33 L. J. (Q.B.) 27; 3 B. & S. 669.
(2) 29 L. J. (Q.B.) 6; 2 E. & E. 1.

1865

WILSON v. RANKIN.

exist, the rule laid down in the first case of *Cunard* v. *Hyde* (1) applied. The court below was of opinion that although the master had authority to stow the cargo, it was not an authority to violate the statute by loading the cargo on deck; neither was it an act of the master which the owner must have been presumed to have assented to. In that judgment we concur.

We are also of opinion that the second ground taken in the court below was a valid ground. The judgment points out that if it had been shewn that the master, without the express knowledge or authority of the owner, had committed the unlawful act, though for the owner's benefit, it would have been a barratrous act on the part of the master; and if it had involved a forfeiture of the ship, the underwriters would have been liable for the loss, by reason of the barratry. And this consideration negatives there being in point of law, in such a case, any implied assent or knowledge on the part of the owner, so as to prevent this insurance on freight from being recoverable.

There was a further contention in the present case; that there was statutory unseaworthiness shewn, because the ship had loaded timber on deck, and had sailed from Canada without having a certificate of clearance; and it was argued that the underwriter was discharged on the principle on which it has been held, that if a ship sails without being provided with proper documents, the risk of the underwriter is increased, and his liability for loss greater than if the ship had sailed with proper documents. Therefore, it was said, having sailed from Canada without the clearance required by the statute at the time of sailing, the absence of that document created a statutory unseaworthiness. We think the principle does not apply to the present case. The document in question is a document which relates merely to a compliance with the requisitions of the statute in the port of loading; its object is to secure a compliance with the statute there, it does not at all bear upon the risk of the voyage after the ship is out of that port, or upon the admissibility of the ship at her port of discharge. The argument on this latter point seemed scarcely pressed by the learned counsel with any idea that it would

(1) 27 L. J. (Q.B.) 408; E. B. & E. 670.

succeed, and we are of opinion that it is not tenable, and that the judgment below ought to be affirmed.

1865

WILSON v. RANKIN.

We wish to limit our judgment to the exact questions to be decided in this case.

POLLOCK, C.B., WILLES, BYLES, KEATING, JJ., and BRAMWELL, CHANNELL, and PIGOTT, BB., concurred.

*Judgment affirmed.*

Attorneys for plaintiff: *Gregory & Rowcliffes.*

Attorneys for defendant: *Field, Roscoe, Field, & Francis.*

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EUROPEAN CENTRAL RAILWAY COMPANY *v.* W. B. WESTALL. *Nov.* 14.

*Debtor and Creditor—Composition Deed—Bankruptcy Act,* 1861, (24 & 25 *Vict. c.* 134)—*Partnership Debt—Joint and Separate Liability.*

A composition deed, in the form of Schedule D to the Bankruptcy Act, 1861, made between the defendant and his two partners of the one part, and certain trustees on behalf of the undersigned creditors of the defendant and his two partners of the other part, by which all the estate and effects of the defendant and his two partners was assigned by the defendant and his two partners for the benefit of the creditors of the defendant and his two partners, affords no answer on equitable grounds to an action against the defendant by a creditor of the defendant for his separate debt.

2 Ch. 672
3 Q.B. 467
4 Ex. 11
4 C.B. 263,

DECLARATION that the defendant was indebted to the plaintiffs in 150*l.*, in respect of three calls of 2*l.* each on twenty-five shares in their company, and in 4*l.* 6*s.* for interest due in respect of the calls being in arrear.

Plea on equitable grounds, that the defendant had executed a composition deed for the benefit of creditors, under the Bankruptcy Act, 1861, all the formal requirements of which act had been complied with, and that the plaintiff was a creditor within the meaning of the act, and was bound by the deed.

The deed (which was in the form given in Schedule D of the Bankruptcy Act, 1861) was made on the 21st October, 1864, between W. B. Westall, J. Westall, and J. B. Westall, copartners under the firm of Westall & Co., of the one part, three trustees on behalf and with the assent of the undersigned creditors of W. B. Westall, J. Westall, and J. B. Westall of the other part; it con-

1865

EUROPEAN CENTRAL RAILWAY CO. v. WESTALL.

veyed all their estate and effects to the trustees absolutely, to be applied and administered for the benefit of the creditors of W. B. Westall, J. Westall, and J. B. Westall, in like manner as if they had been at the date thereof duly adjudged bankrupts.

Demurrer and joinder in demurrer.

*Rew*, in support of the demurrer. First, the plea is, by the recent decision, *Clarke* v. *Williams* (1), clearly bad at law, and it is not strengthened by being pleaded equitably. Secondly, the plea sets out a deed which is made not by the defendant alone, but by the defendant and his two partners. The joint property of the three only is conveyed to trustees for the benefit of the joint creditors, and is to be distributed as in bankruptcy; so that it appears on the face of the deed that the plaintiff would be entitled to nothing under it. The plea is therefore bad.

*C. H. Hopwood*, contrà. The plea is good as an equitable plea. The deed, under 24 & 25 Vict. c. 134, s. 192, is, by performance of all the requirements of the statute, binding on all the creditors, "as if they were parties to and had duly executed the same." By s. 197, after registration, the debtor and creditors "who have assented thereto, or are bound thereby, shall in all matters relating to the estate be subject to the jurisdiction of the Court of Bankruptcy, as if the debtor had been adjudged a bankrupt and the creditors had proved." Now, if a creditor has proved, he will be deemed to have elected under 12 & 13 Vict. c. 106, s. 182; and the court of Chancery (of which the court of Bankruptcy is a part) will grant an injunction to restrain his suing at law: *Ex parte Diack* (2); *Ex parte Glover* (3); *Ex parte Bernasconi* (4). Secondly; in *Walker* v. *Nevill* (5) there was a similar plea by one of the defendants of a deed executed by the firm of which he was a partner. That case shews that it is not a sufficient objection to a deed that creditors of joint and separate estates are put on the same footing. Both the defendant in that case and this defendant, for aught that appears, may have been joint as well as separate creditors. In that case the court held the averment, that "a majority of the said creditors of the defendant, and each of them,

(1) 34 L. J. (Ex.) 189 (2) 2 Mont. & A. 675. (3) 1 G. & J. 270.
(4) 2 G. & J. 381. (5) 3 H. & C. 403; 34 L. J. (Ex). 73.

assented," sufficient to shew that the requisite majority of the joint and the separate creditors had assented. Here the averments are of equal force.

*Rew* was heard in reply.

COCKBURN, C.J. Our judgment must be for the plaintiffs. The deed is a composition deed between the members of a firm and the creditors of the firm; and in such a case it is impossible to mix up the private debts of an individual member of the firm with the general partnership liabilities. The action, then, being against a member of the firm for the recovery of a separate debt, the plea, which sets up as a defence a composition deed entered into by the members of the firm in respect of their partnership liabilities, affords no answer to the action.

MELLOR, SHEE, and LUSH, JJ., concurred.

*Judgment for the plaintiffs.*

Attorneys for plaintiffs: *Hughes, Masterman, & Hughes.*
Attorney for defendant: *E. Atkinson.*

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BOND AND ANOTHER *v.* WESTON.

*Nov.* 14.

*Debtor and Creditor—Bankruptcy Act*, 1861—(24 & 25 *Vict. c.* 134)—*Deed of Partnership—Unreasonable Clauses—Power to pass Trustees' Accounts and give Discharge to Trustees—Power to Appoint new Trustees.*

A deed of inspectorship made between a debtor and his creditors under the Bankruptcy Act, 1861, contained the following clauses:—1. That a resolution signed by the majority in number and value of the creditors, parties to the deed, or bound by it, should be effectual for the allowance and passing of the accounts of the trustees, and for discharging them from the trusts of the deed. 2. That in case any trustee appointed by the deed should die, or refuse, or become incapable to act in the trust, a majority of the creditors present at a meeting of the creditors of the debtor convened for that purpose should choose a person to be trustee:—

*Held*, that the clauses were not unreasonable, and that the deed was binding on the non-assenting creditors.

DECLARATION on a promissory note and on the common money counts.

Plea, that the defendant had entered into a deed of assignment

1865

BOND v. WESTON.

and inspectorship, under the Bankruptcy Act, 1861, all the requirements of which had been complied with; that the plaintiffs were creditors of the defendant, and were bound thereby.

The deed (which was set out at length) was made on the 17th of April, 1865, between the defendant of the first part; H. Huggins and H. Buxton of the second part; the several persons, companies, and firms whose names and seals are hereunto subscribed in the second schedule to the deed of the third part; three trustees of the fourth part; the several other persons, companies, and firms whose names and seals are hereunto set and subscribed in the third schedule to the deed, or who shall become bound thereby, being respectively creditors of the defendant, or who would be entitled to prove under an adjudication of bankruptcy against him, founded on a petition filed on the day of the date of the deed, of the fifth part. The deed,—after reciting an assignment by way of mortgage by the defendant of certain property to H. Huggins and H. Buxton in trust for all persons who were creditors of the defendant, and that it was expected that all the creditors of the defendant would execute the deed, but the only creditors who did execute were those named in the second schedule; and that the defendant being indebted to the parties of the fifth part, it was agreed to assign all the defendant's estate to the trustees upon certain trusts,—witnessed that the parties of the first and second parts assigned all the defendant's estate to the trustees upon trust to grant the defendant a licence to carry on and manage his business of a tavern-keeper until April, 1866; and the parties of the fifth part agreed not to sue the defendant during the aforesaid time, or during such enlarged time as the trustees might grant. The deed then contained the usual covenants by the defendant relating to the proper management of the business; and provided that if, by reason of any unforeseen cause, not wilfully occasioned by the defendant, any delay should take place in the final settlement of his affairs, and if it should appear expedient to the trustees for the time being to extend the time allowed to the defendant, or any enlarged time that should have been given to him, the trustees were authorized, without any further consent of the creditors of the defendant, to extend the time given for winding-up the affairs of the defendant for the further space of twelve

months, or any less time, to be computed from the 17th April, 1866, or the expiration of such extended time. The deed also, among many other provisions not material to the case, contained the following:—"That any resolution signed by the majority in number and value of the creditors, parties hereto or bound hereby, shall be binding on all the several parties hereto or bound hereby, and shall be effectual for the allowance and passing of the accounts of the said trustees, and for discharging them from the trusts hereof, and from all claims and demands in respect thereof.

. . And that in case the said trustees hereby appointed, or any or either of them, or any trustee to be appointed as hereinafter mentioned, shall die, or refuse or decline, or become incapable to act in the matters and things hereby entrusted to them as aforesaid; then, and in every such case, the major part in number and value of the creditors of the defendant, at a meeting convened by circular sent by any creditor of the defendant, by the post or otherwise, may nominate and choose such other person or persons as they shall think fit to be a trustee or trustees in the place or stead of such of the said trustees who shall die or refuse or decline or become incapable to act as aforesaid; and every such person so to be chosen as aforesaid shall have the like powers and authorities in all things as the person or persons in whose room and place they or he shall have been chosen, had or might exercise under and by virtue of these presents, if living and continuing to act, and as if the name or names of such new trustee or trustees had been inserted in these presents instead of the names of the trustees hereby appointed or one of them."

Demurrer to the plea, and joinder in demurrer.

*Hannen*, in support of the demurrer. The objection to the deed is, that the clause which gives power to a majority of the creditors to discharge the trustees, and also the clause which provides for the appointment of new trustees, are unreasonable, and therefore the deed is not binding on the non-assenting creditors. The Bankruptcy Act, 1861, has fixed the majority who have power to bind the residue; and it is not competent for the three-fourths of the creditors to delegate that authority to a less number. If they can delegate their authority to a mere majority, they may do so to any number. The intention of the legislature was that three-

1865

BOND v. WESTON.

fourths of the creditors should agree upon the terms on which the debtor should be released, and that those terms should be binding on the non-assenting creditors; but if the assenting majority of creditors are allowed to delegate their authority, then other terms might be imposed as to the release of the debtor which were never contemplated when the deed was executed. By these objectionable clauses a simple majority may elect a trustee, a simple majority may give a discharge to a trustee. Suppose a question were to arise as to whether a trustee had exceeded his powers under the deed, a simple majority of creditors could give him a release. Suppose a creditor desired to investigate the accounts, he might be prevented by a resolution of the majority of creditors.

[LUSH, J. No; the clause does not state the resolution shall be signed by a majority of creditors, but "a resolution signed by the majority in number and value of the creditors parties hereto or bound hereby."]

That may be so, but still the language is different with regard to the election of trustees; that clause is clearly a violation of the maxim *delegatus non potest delegare.*

[COCKBURN, C.J. The statute enacts that three-fourths in number and value of the creditors shall bind the rest, but the assent of all the creditors is not necessary for carrying out the provisions of the deed.]

The deed grants a letter of licence to the debtor for one year, and there is a provision by which the trustees may extend the time, and according to the deed this might be done by trustees elected by less than three-fourths in number of the creditors.

[LUSH, J. The clause confers no power on the majority of creditors to dismiss one trustee and appoint another; it is only in the event of a trustee dying, or refusing to act, or becoming incapable, that the appointment is to be exercised.

SHEE, J. I see nothing unreasonable in the clause. If three-fourths of the creditors could not be got together no new trustee could be appointed and the deed might come to an end.]

*Field, Q.C.* (*Macnamara* with him) contrà, was not called upon.

COCKBURN, C.J. I think that the non-assenting creditors are in no way prejudiced by the power given to a majority of creditors

duly convened to appoint new trustees. The clauses in question are not unreasonable but necessary efficiently to carry out the object of the deed.

1865

BOND v. WESTON.

MELLOR, SHEE, and LUSH, JJ., concurred.

*Judgment for the defendant.*

Attorneys for plaintiffs: *Plews & Irvine.*
Attorneys for defendant: *Brady & Son.*

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## CHURCHWARD *v.* THE QUEEN.

*Nov.* 21, 24.

*Contract by Government Officials, construction of—Implied covenant—Petition of right—Practice—Right to begin on cross demurrers.*

By articles of agreement between the Lords Commissioners of the Admiralty, on behalf of the crown, and C., in consideration of the payments therein stipulated, C. covenanted that he would during the continuance of the contract convey to the satisfaction of the commissioners the mails which should from time to time by the commissioners or the Postmaster-General be required to be conveyed between Dover and Calais, and Dover and Ostend, by means of a sufficient number (not less than six) of vessels of certain tonnage, and properly officered, manned, and equipped. That one or more of such vessels should be at all times ready to convey the Bombay, India, and other distant mails, or for other special service for the government between Dover and Calais, without any charge beyond the subsidy thereinafter mentioned, and also for the like special service between Dover and Ostend, for which the commissioners were to pay 58*l.* each voyage. In addition, it was to be lawful for the commissioners to require the contractor to provide vessels to convey distinguished persons not exceeding twelve voyages from port to port in any one year free of all charge beyond the said subsidy; but if more than twelve in a year, the voyages in excess to be paid for at the rate of 23*l.* each. That one of such vessels should leave Dover and Calais respectively every week-day, and one leave Dover and Ostend respectively every alternate week-day. Penalties were then provided for the observance of the contract by the contractor. The commissioners in consideration of the premises, and of the contractor at all times strictly performing the covenants and agreements on his part, agreed, on behalf of the crown, that they would pay him by bills at seven days a sum out of moneys to be provided by parliament, after the rate of 18,000*l.* per annum, by quarterly payments; the first payment to be three months from the commencement of the service. The contract was to commence from the date and continue for eleven years. The contractor was to be at liberty to employ the vessels in other services, subject to the penalties provided, if he was unable also to perform the services contracted for:—

*Held*, that there was in the above agreement only a covenant by the commissioners, on behalf of the crown, that, in consideration of the contractor performing

1865

CHURCHWARD v. THE QUEEN.

his part of the contract, by having vessels always ready for the service, the crown would pay him if parliament provided the funds; and that there was no implied covenant on the part of the commissioners to employ the contractor; and that a petition of right, founded on the agreement, and alleging that the commissioners had refused to employ the contractor to carry the mails, and did not nor would permit him to perform the agreement, and prevented him from carrying the mails, and claiming damages, could not be maintained.

On the argument of cross demurrers, the late practice in the Court of Queen's Bench will at present be adhered to; and the plaintiff, and not the party first demurring, has a right to begin.

THIS was a petition of right.

The petition shewed that by articles of agreement made the 26th of April, 1859, between the Commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland (for and on behalf of her Majesty) of the first part, and the petitioner of the second part, it was, among other things, witnessed that, in consideration of the payments thereinafter stipulated to be made to the petitioner, the petitioner did for himself, his heirs, executors, and administrators, covenant, promise, and agree with the commissioners that he, his executors and administrators, should, and would, during the continuance of the contract, diligently, faithfully, and to the satisfaction of the commissioners for the time being, convey in the manner in the agreement specified her Majesty's mails, which should, at any time or times, and from time to time, by the commissioners or her Majesty's Postmaster-General, or any of the officers or agents of the commissioners or the Postmaster-General be required to be conveyed from Dover to Calais, and from Calais to Dover, and from Dover to Ostend, and from Ostend to Dover, as thereinafter mentioned. And the commissioners (clause 16) in consideration of the premises in the agreement mentioned, and of the petitioner, his officers, servants, and agents, at all times strictly and punctually performing the covenants and agreements thereby entered into by the petitioner, did, for and on behalf of her Majesty, her heirs and successors, agree with the petitioner that they, the commissioners, on behalf of her Majesty, would pay, or cause to be paid, to the petitioner, by bills payable by the Postmaster-General in seven days after the respective dates thereof, a sum out of moneys to be provided by parliament, after the rate of 18,000*l.* per annum, by quarterly payments, and with a

proportionate part thereof, should that contract terminate on any other day than a day of payment; the first of such quarterly payments to be made at the expiration of three calendar months from the commencement of the service under the contract; and it was thereby further agreed (clause 17) that the contract should commence on the day of the date thereof, and should continue in force until the 26th of April, 1870, and should then determine, if either of the parties should have given to the other, twelve calendar months previous, notice in writing, of its being their intention that the same should so determine; but if any such notice should not be given, the contract was to continue in force after the 26th day of April, 1870, until the expiration of twelve calendar months notice in writing, given by either of the parties to the other of them, that the same should determine, and which last-mentioned notice might be given at any time after the 26th of April, 1869, and at the expiration of such notice the said contract should determine accordingly, but not so as to prevent either of the parties availing themselves thereof for recovering any sum of money or damages, should there have been any breach of the contract previously to the determination of the same. Averment that "the petitioner entered upon the performance of the said agreement, and did convey her Majesty's mails in accordance with the agreement until the breach of covenant hereinafter mentioned, and although he, his officers and agents, and each of them, hath at all times strictly and punctually performed the covenants and agreements by the articles of agreement entered into by the petitioner, and the petitioner has always been ready and willing to perform the said agreement on his part, and all things have happened to entitle the petitioner to be permitted so to do and to continue to perform the said agreement, yet the said commissioners did not, nor would, allow or permit the petitioner to carry the said mails as aforesaid, and did not, nor would, observe or perform the said agreement on their part, and have broken the same in this, that they have omitted, neglected, and refused to employ the petitioner to carry the said mails, and did not, nor would, permit the petitioner to continue to perform the said agreement, and wholly omitted, neglected, and refused so to do, and have hindered and prevented, and still do hinder and prevent, the petitioner from carrying the said mails as

1865

CHURCHWARD v. THE QUEEN.

aforesaid; and have thereby prevented the petitioner from earning, and deprived him of the moneys, gains, and profits which he would otherwise have derived and acquired therefrom; and by reason of the premises he has been deprived of the benefits, while he remains subject to the burden of a certain lease of certain premises at Dover, granted to the petitioner by the commissioners, which were, with the knowledge of the said commissioners, taken by the petitioner for the purpose of carrying out the said contract," and alleging other special damage from useless outlay, &c., for the performance of the services; claiming 126,000*l.* compensation for the damages and losses.

The second plea, by the Attorney-General, set out the articles of agreement at length, nearly the whole of which was brought to the notice of the Court, and commented upon by the counsel on each side.

"Articles of agreement made this 26th April, A.D. 1859, between the Commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland (for and on behalf of her Majesty) of the first part, and Joseph George Churchward, of, &c., hereinafter designated 'the contractor,' of the second part, witness (1)

1. "That in consideration of the payments hereinafter stipulated to be made to the contractor, the contractor doth for himself, his heirs, executors, and administrators, hereby covenant, promise, and agree to and with the said commissioners that he, the contractor, his executors and administrators, shall and will during the continuance of this contract, diligently, faithfully, and to the satisfaction of the said commissioners for the time being, and at a speed which on the average of any trial of each vessel shall not be less than thirteen knots an hour, convey her Majesty's mails (in which designation all despatches and bags of letters are agreed to be comprehended), which shall at any time or times, and from time to time by the said commissioners or her Majesty's Postmaster-General, or any of the officers or agents of the said commissioners, or the Postmaster-General, be required to be conveyed from Dover to Calais, and from Calais to Dover, and from Dover to Ostend, and from

(1) The clauses were not numbered in the original agreement; the numbers are inserted for convenience of reference in the report.

Ostend to Dover, as hereinafter mentioned, by means of a sufficient number (not less than six) of good, substantial, and efficient steam vessels, each of such vessels being of not less than 280 tons builder's measurement, and being supplied and furnished with engines of sufficient horse-power, and with all other necessary equipments, apparel, and appurtenances, and also manned with competent officers with appropriate certificates granted pursuant to the 17 & 18 Vict. c. 104, or to the act or acts in force in that behalf for the time being, and with engineers, and a sufficient crew of able seamen and other men to be in all respects as to vessels, engines, machinery, equipments, engineers, officers, and crew, subject in the first instance, and from time to time, and at all times afterwards, to the approval of the said commissioners, or such persons as shall at any time or from time to time have authority under this contract, or under the said commissioners, to inspect and examine the same.

2. " That one or more of such vessels, so equipped and manned as aforesaid, shall be at all times at the disposal of and be navigated by the contractor for her Majesty's government as special boats for the conveyance of the Bombay, India, China, Mauritius, and Australian mails, or of any despatches, or for other special services between Dover and Calais, and shall convey such mail despatches, and perform such special services between those ports, and shall for that purpose be stationed at such one of the beforementioned ports as the commissioners may from time to time or at any time direct, and without any charge for the same beyond the subsidy of 18,000*l.* a year hereinafter provided to be paid to the said contractor for the due and faithful performance of this contract.

3. " Provided always, and it is hereby agreed, that in addition to the services herein contracted to be performed, it shall be lawful for the commissioners to require the contractor to provide vessels to be navigated at the expense of the contractor, for the purpose of conveying distinguished persons, not exceeding twelve voyages, from port to port, including in each of such twelve voyages any return voyage thereby made necessary (free of all charges for the same beyond the said subsidy hereinafter provided) in any one year, but should the commissioners require

1865

CHURCHWARD v. THE QUEEN.

vessels to be provided for the conveyance of distinguished persons for a greater number than twelve voyages in any one year, then and in such case the voyages in excess of twelve shall be paid for by the commissioners to the contractor in manner following, that is to say, 23*l.* for a voyage between Dover and Calais, including the return voyage thereby made necessary. And further, that one or more of such vessels shall be at all times at the disposal of and be navigated by the contractor for her Majesty's government as special boats for the conveyance of despatches or other special services between Dover and Ostend, and shall for that purpose be stationed at such one of the before-mentioned ports as the commissioners may from time to time or at any time direct. And the commissioners shall pay to the said contractor for every such voyage between Dover and Ostend, including the return voyage thereby made necessary, the sum of 58*l.*; but for such twelve voyages between Dover and Calais, or other additional voyages between Dover and Calais and Dover and Ostend, the contractor shall not be entitled to demand any passenger fares from the passengers ordered by the said commissioners to be conveyed.

4. "And the contractor doth hereby agree that he will at all times, and at his sole cost and charge, provide, maintain, keep seaworthy, in complete repair, efficiency, and readiness at Calais, a small steam vessel, to be approved of by the commissioners, and such vessel shall cost not less than 2000*l.*, and be of such light draught of water as will enable her at all times of tide to land and embark mails and passengers. And that all the mails and government or official passengers which have to be landed or embarked at Calais by virtue of this contract, shall be landed or embarked by aid of the small steamer free of all charge for the same.

5. "That one of such vessels, so equipped and manned as aforesaid, shall leave Dover once every week-day for Calais, and one of such vessels shall leave Calais once every week-day for Dover, and that one of such vessels, so equipped and manned as aforesaid, shall leave Dover once every alternate week-day for Ostend, and one of such vessels shall leave Ostend once every alternate week-day for Dover, immediately after the arrival of the mail trains at the said ports respectively, and when the mail bags shall have

been put on board; the commissioners having the power to appoint the original times of departure, and to alter the time of departure from the said ports respectively as often as they may consider the exigencies of the public service require them to do so, upon giving to the contractor one calendar month's notice thereof, and in every such case of alteration the said vessels shall start according thereto.

6. "That if the contractor shall at any time during the continuance of this contract fail to provide such steam vessel, or any vessel whatsoever which he is hereby bound to provide, so equipped and manned as aforesaid, ready to put to sea from Dover, Calais, or Ostend, or such vessel should not proceed on her voyage at the time at which the same should leave Dover, Calais, or Ostend, in performance of this contract, or shall put back into port after starting (except from stress of weather), then and so often as there shall be any one of such defaults, the contractor shall and will pay unto her Majesty, her heirs and successors, the sum of 30*l.*, and also a sum of 10*l.* for every successive period of one hour which shall elapse (but not beyond a period of eight days from such appointed hour) until such steam vessel, so equipped and manned, shall actually proceed to sea and continue her voyage with the said mails and despatches, or such despatches, or on any such special service as aforesaid, from Dover, Calais, or Ostend, as the case or default may be; but the payment of such sum or sums shall not be enforced should it be proved to the satisfaction of the commissioners that such default arose from circumstances over which the contractor and his servants had not nor could have had any control, but the payment of or liability to pay the sum or sums last hereinbefore-mentioned, shall not exonerate the contractor from any damages which may accrue or have accrued from any expenses which may arise or have arisen by the said commissioners transmitting the said mails and despatches, or such despatches, or having any such special services performed as aforesaid by other means.

7. "That whenever the Bombay, Indian, China, Mauritius, or Australian mails shall arrive at Calais too late for the ordinary packet, the contractor shall provide for the immediate conveyance of the same to Dover, in one of the steam vessels to be employed

1865

CHURCHWARD v. THE QUEEN.

under this contract, or by some other means satisfactory to the commissioners, their officers or agents, free of all charge for the same beyond the subsidy, hereinafter provided, for the due and faithful performance of this contract.

8. [A clause enabling the commissioners to deduct 15*l.* in case the contractor shall not have landed the mails in time to be forwarded by the mail train appointed to carry them.]

9. "That should it be deemed by the commissioners, or by any of their authorized agents requisite for the public service, that any vessel, employed under this contract, should at any time or times delay her departure from any places herein mentioned beyond the period appointed for her departure, the commissioners, or such authorized agents, shall have power and be at liberty to order such delay, not, however, exceeding twenty-four hours, by letter, addressed by their secretary, or other officer or agent of the commissioners, to the master of any such vessel, or persons acting as such, and which shall be deemed a sufficient authority for such detention, anything herein contained to the contrary thereof notwithstanding."

[Then followed clauses that the commissioners should have power to survey by any of their officers, and declare any of the vessels unfit, and no such vessel should be employed under a penalty of 100*l.* until made fit to the satisfaction of the commissioners. That the vessels, after putting to sea, should make the best of their way to the opposite port, under a penalty of 100*l.* for delay or deviation. That the contractor should allow an officer, appointed by the commissioners or Postmaster-General, to be on board, free of charge, to have the custody of the mails; or, if the commissioners should deem it expedient, then the master of the vessel to have charge of the mails, and act as a post-office officer. That the contractor should enter into a bond for the due and punctual conveyance of the mails, in addition to the other bond with sureties.]

13. "That the contractor shall and will provide on board each of the said vessels a convenient, secure, and proper place of deposit under lock-and-key, for the said mails and despatches, and suitable boats, properly manned and equipped, and whatever else may be necessary for their safe embarkation and disembarkation.

14. "That the contractor shall and will at all times during the

continuance of this contract, at his own cost provide, and keep seaworthy and in complete repair, a sufficient number of good, substantial, and efficient steam vessels (not less than six) with engines of sufficient horse-power to each vessel for the service hereby contracted to be performed; and at the like cost, adequately provide and furnish each and every of the same vessels with all tackle, stores, oil, tallow, fuel, provisions, machinery, engines, anchors, cables, two efficient boats, fire pumps, and other proper means for extinguishing fire, and all other furniture and apparel, and whatsoever else may be requisite and necessary for equipping the said vessels, and rendering them at all times fully efficient for the said service.

15. "And it is hereby agreed between the parties hereto, and especially by the contractor, that all and every the sums of money hereby stipulated to be paid by the contractor unto her Majesty, her heirs and successors, shall be considered as stipulated or ascertained damages, and should the same, or any of them, become payable, and not discharged forthwith, each and every of such sum and sums of money so becoming payable, and not discharged forthwith, may be deducted and retained by the commissioners out of the moneys payable at any time by them, or by their direction, to the contractor, or the payment thereof enforced as a debt or debts due to her Majesty, with full costs of suit, as the commissioners, in their discretion, may think fit.

[Clauses 16 and 17 are set out at length in the petition.]

18. [Related to the cancelling of a previous agreement between the same parties, of 20th June, 1855.]

19. "And the contractor doth hereby for himself, his heirs, executors, and administrators, covenant and agree, to and with the said commissioners, that he, the contractor, his executors and administrators shall and will, during the continuance of this contract, pay all harbour, passing tonnage, and other tolls and dues whatsoever, which may, during such period, be legally charged or payable, and recoverable at Dover, Calais, or any ports of the United Kingdom, upon the packets employed by the contractor in the performance of this contract, or the said mails or passengers, hereby contracted to be conveyed, or in consequence of the extra voyages herein provided for the conveyance of distinguished

1865

CHURCHWARD v. THE QUEEN.

personages, to and from England; and shall and will, at the costs of the contractor, his executors, or administrators, land and embark such mails and despatches, and distinguished personages, and their suites, and servants, at Dover, Calais, or Ostend, when intended to be landed at or shipped from those ports respectively, and pay all boat-hire for the same. And further that the said contracter shall and will, indemnify her Majesty, her heirs, and successors, and the commissioners from and against all such tolls, dues, and boat-hire, and all other payments whatsoever heretofore made by, or on behalf of her Majesty, in respect of the mails and mail packets plying to and from Dover or Calais, and from and against the payment thereof, and all costs, charges, damages and expenses in respect thereof, or relating thereto now payable.

20. "Subject always to the penalties hereby agreed upon, for non-fulfilment of the provisions of this contract, and to the other consequences of any breach of this contract, nothing herein contained shall deprive the contractor of the liberty of employing his steam-vessels to his own advantage, and at his own discretion, when it is not necessary to employ the said vessels for the mail service, or for special services, according to the terms of this contract; but the contractor employing any such steam-vessels to his own advantage and at his own discretion, shall not be any excuse for the non-fulfilment of this contract on his part, although from accidents or otherwise, any vessel while so employed shall become disabled, or be lost.

21. "And it is hereby further agreed and provided that the contractor shall not assign, underlet, or otherwise dispose of this contract, or any part thereof; and that in case of the same or any part thereof being assigned, underlet, or otherwise disposed of, or of any breach whatever of this contract on the part of the contractor, it shall be lawful for the commissioners (if they think fit) by writing under their hands, or under the hands of their secretary to determine this contract, without any previous notice to the contractor or his agents; nor shall the contractor be entitled to any compensation in consequence of such determination.

22. [A clause as to the service, &c., of notices.]

24. [A clause with a penalty of 4000*l.*, liquidated damages, for the due performance by the contractor of the agreement.]

The third plea stated that the articles of agreeement of the 26th of April, 1859, were in the words set forth in the second plea, and that the breaches in the petition mentioned, were committed after the 20th of June, 1863, and that the claim made by the suppliant is by virtue of the said articles, and relates to a period subsequent to the 20th of June, 1863, and that the suppliant is the same Joseph George Joseph Churchward, and the articles of the 26th of April, 1859, are the same articles or contract as are respectively described in the statute 26 & 27 Vict. c. 99, and the statute 27 & 28 Vict. c. 73 (1), and that no moneys were ever provided by parliament for the payment to the suppliant for, or out of which the suppliant could be paid for the performance of the said contract, for any part of the said period subsequent to the 20th of June, 1863, or for the payment to the suppliant for, and in respect of, or out of which the suppliant could be paid or compensated for, in respect of any damages sustained by the suppliant by reason of any of the breaches of the said contract committed subsequent to the said 20th of June, 1863.

There was also a demurrer to the declaration.

The suppliant joined in demurrer; and also demurred to the second and third pleas, in which there was joinder by the Attorney-General.

Nov. 21. *The Attorney-General*, for the crown, asked the direction of the Court as to which party had a right to begin where there were cross demurrers.

*Sir H. Cairns, Q.C.*, for the suppliant, observed that in this court, and in the court of Common Pleas, the practice was for

(1) 26 & 27 Vict. c. 99 (28 July, 1863), s. 15, enacts, that a sum not exceeding 950,000*l* be applied to defray the charge of the post-office packet service, which will come into course of payment during the year ending on 31st March, 1864; which sum includes provision for payments to Mr. Joseph George Churchward, for the conveyance of mails between Dover and Calais and Ostend, from 1st April, 1863, to 20th June, 1863; but no part of which sum is to be applicable or applied towards any payment in respect of the period subsequent to 20th June, 1863, to the said J. G. Churchward, or to any person claiming through him, by virtue of a certain contract made on 26th April, 1859, &c., or towards the satisfaction of any claim whatever of the said J. G. Churchward, as far as relates to any period subsequent to the 20th June 1863. The 27 & 28 Vict. c. 73, s. 17, and 28 & 29 Vict. c. 123, s. 23, contain the same prohibition.

1865

CHURCHWARD v. THE QUEEN.

the plaintiff to begin; and he cited *Halhead* v. *Young*, (1) and *Wolverhampton Waterworks Company* v. *Hawkesford*. (2)

*The Attorney-General* cited *Hill* v. *Cowdery* (3), shewing that the practice in the court of Exchequer is for the party first demurring to begin.

COCKBURN, C.J. I have great doubts as to which is the more convenient course. The practice formerly in this court was for the party first demurring to begin; but more recently the practice has been altered; and without saying which, on consideration, we should adopt as the rule, we think that for the present we must abide by the more recent practice.

*Sir H. Cairns, Q.C.* (*Sir F. Kelly, Q.C., Bovill, Q.C.*, and *Hannen*, with him) for the suppliant. The first and main question on these demurrers is, whether there is any covenant on the part of the Lords of the Admiralty, to send any mails by the contractor or to permit him to carry them. The principle is well settled that where a person stipulates to perform a service in consideration of a payment, although there be no correlative covenant to that effect, a covenant to employ, and to allow the payment to be earned will be implied: *Pordage* v. *Cole* (4), *Wood* v. *Copper Miners of England* (5), *Emmens* v. *Elderton*. (6) In the present case the contractor agrees (clause 1) to convey and to be ready to perform the service of conveying all the mails which the commissioners shall require to be conveyed (not which they shall require *him* to convey,) between the specified ports; and to have proper vessels (not less than six), at all times ready for the service; and although it may be that the commissioners would not be bound to send any mails by that route, yet if they send any, they are bound to send them by the contractor. He is, also (clause 2), always to have a special boat ready to convey the Indian and other mails. And all this is to be done (under penalties for non-performance), for the one annual sum of 18,000*l.* This is still further shewn by contrasting the clause, 3, as to the conveyance of distinguished persons, in which the phrase-

(1) 6 E. & B. 312; 25 L. J. (Q.B.) at p. 291.

(2) 28 L. J. (C. P.) 242; and see *Mayor of Blackburn* v. *Parkinson*, 1 E. & E. 71; 28 L. J. (M. C.) 7.

(3) 1 H. & N. 360; 25 L. J. (Ex.) 286, n.

(4) 1 Wms'. Saund. 319 *l.*

(5) 7 C. B. 906; 18 L. J. (C. P.) 293.

(6) 4 H. L. C. 625.

1865.

CHURCHWARD v. THE QUEEN.

ology is altered, as contemplating something which might not happen. The subsidy of 18,000*l.* is of course a small remuneration for the expense of the service; and this affords a key to the contract, viz., that the contractor has other advantages by carrying passengers, &c., of all of which he is deprived unless the commissioners are bound to send the mails by him. Clauses 5, 6, 7, 9, 13, and 14, stipulate minutely for services *de die in diem*, and shew conclusively that as long as any mails were sent the petitioner was to be employed. Then, the stipulation (clause 16) as to payment is, that the 18,000*l.* is to be paid for each year out of moneys to be provided by parliament, shewing that the contractor was content to rely on parliament being sure to supply money for the payment of services actually performed; but that he relied on the implied covenant on the part of the commissioners to employ him, and so put him in a position to ask parliament for the money; moreover, the first payment is to be made three months from the commencement of the service, which shews that the contractor *must* be allowed to perform the service, otherwise there is no compensation. [He also referred at length to clause 19.]

Secondly, the breach is well assigned. When a certain service is stipulated for a certain period, and the employer refuses to employ, the employed has two courses, either he may wait till the end of the period, or he may at once sue on the refusal, without waiting; and the latter is the more proper course: *Emmens* v. *Elderton* (1); see particularly Crompton J's. opinion, citing Erle J's. opinion in *Beckham* v. *Drake* (2); *Hochster* v. *De la Tour.* (3)

Thirdly, the statutes referred to in the third plea, afford no answer to the breach alleged; those enactments only amount to saying that in particular years parliament has not provided the money; the providing the money cannot be a condition precedent to employing the suppliant, though the fact of the supply having been refused, might be an answer to a breach for non-payment. That is not the present cause of action; moreover, it nowhere appears that the time during which the commissioners refused to employ the suppliant, was the time for which parliament refused

(1) 4 H. L. C. 624, 645.
(2) 2 H. L. C. 606.
(3) 2 E. & B. 678; 22 L.J. (Q.B.) 455.

1865

CHURCHWARD v. THE QUEEN.

to grant the subsidy and non constat, but that the reason for parliament granting no money was, that the commissioners had refused to employ the suppliant. At all events, if parliament had refused the money, that may affect the damages but affords no defence.

Lastly, does the fact that the crown is concerned in the matter make any difference? Under sections 13 and 14 of the 23 & 24 Vict. c. 34, if the suppliant recovered damages there would be no difficulty in applying to parliament for the means to pay; assuming the cause of action be such as entitles the suppliant to succeed against the crown. Now the cause of action alleged is the breach of the contract by refusing to employ, and is not a mere tort, and the distinction is clear that though for a tort strictly so called you cannot sue the crown, yet for a tortious breach of contract, a petition of right may be maintained; and the cases of *Tobin* v. *Reg.* (1) and *Feather* v. *Reg.* (2) are consistent with this view. That the damages are unliquidated cannot really affect the question. Suppose a ship built by contract with the Admiralty on behalf of the crown for 50,000*l.* to be paid on delivery; there can be no doubt a petition could be sustained for the price against the crown if the ship were delivered and accepted. And can it be said that if the Admiralty refused to receive it, the proceeding could not be maintained because it was for unliquidated damages? The distinction between tort and tort founded on contract has always been kept up: *Legge* v. *Tucker.* (3)

[COCKBURN, C.J., intimated that, subject to anything the Attorney-General might say, the court did not desire any further argument on this point.]

The clause, 17, of the contract itself, as to the determination of it, shews that the parties contemplated the right of either party to damages.

*The Attorney-General* (*The Solicitor-General* and *Poulden* with him), for the crown. First, putting aside any reference to the peculiar law as to a proceeding against the crown, the question must depend chiefly on the terms of the contract itself, and if there be any ambiguity in those terms, recourse may be had to the

(1) 16 C. B. (N. S.) 310; 33 L. J. (C. P.) 199.

(2) 12 L. T. (N. S.) 114.

(3) 1 H. & N. 500; 26 L. J. (Ex.) 71.

general nature of the contract, and to the particular intention and circumstances of the contracting parties. It is conceded on the part of the suppliant that he does not proceed for a breach of the commissioners' express contract to make the stipulated payment, but only on a covenant to be implied on their part to employ and permit him to carry the mails. No doubt no formal words are required to make a covenant; but if an instrument contains express covenants on each side, it is a well-established principle that you cannot ordinarily imply any other covenants on the one side from the language used in the covenants of the other, unless the intention is very clearly to be seen from the terms used and the general scope of the instrument. So far from there being any room for such an implication in the present case, the considerations and covenants on each side are clear and express, the payment on the one side of the 18,000*l.*, and the readiness and willingness to convey all the mails which he may be required to convey on the other. The commencement of the service dates with the contract, from which time the readiness and willingness are to commence. In order to imply the covenant on the part of the commissioners to send all the mails by the contractor, even the words used have to be forced, for it is obvious that "require" must mean "shall call upon the contractor to convey" (as in other parts of the instrument) and not "shall have occasion to convey." Then, if we look at the position of the parties, the circumstances are equally against the implication that the crown would by its commissioners bind itself to employ a particular person, whether parliament should approve, by its vote of the subsidy, or not. All that the contractor has to do to be entitled to claim the 18,000*l.* is to be ready to perform the stipulated service, so that the breach alleged is not the true cause of action; and it is admitted that no other could be alleged, because the breach by nonpayment would have involved the necessity of the allegation that parliament had provided the funds.

The authorities cited are really in favour of the crown, and shew that on such an instrument as the present no further covenant ought to be implied. In *Pordage* v. *Cole* (1) the stipulation was, that it was agreed between the parties that the one should pay the

(1) 1 Wms'. Saund. 319 *l.*

1865

CHURCHWARD v. THE QUEEN.

other a certain sum for his land, and that could only mean, as both had executed the agreement, that the other agreed to give the land for the money. But there is no such necessity to imply the covenant contended for in the present case. Again, the payment cannot depend on the contractor carrying every single mail. The rules laid down in the notes to *Pordage* v. *Cole* (1) and the cases cited are *Ughtred's* case (2), *Boone* v. *Eyre* (3), *Campbell* v. *Jones* (4), shew this. But there are authorities more in point against implying any covenant: *Aspdin* v. *Austin* (5), and *Dunn* v. *Sayles*. (6) Those cases are approved in *Emmens* v. *Elderton* (7), which itself is no authority the other way, as it only shews that the company were bound to retain the plaintiff during the year, but not to give him any legal business to do: that is in the present case to pay over the subsidy if voted, but not to send any mails. Looking at the position of the parties, it is quite plain that the commissioners intended to guard against binding the crown to anything beyond paying the subsidy, if parliament would provide it; in the same way as Lord *Mansfield* said the plaintiff had contracted in *Macbeath* v. *Haldiman*. (8) *Scott* v. *Avery* (9) shews that if parties choose to contract to be paid on the condition of a third party doing something, the condition is binding; *Clarke* v. *Watson* (10), as to the certificate of a surveyor, is to the same effect.

The special position of the commissioners affords an additional argument against the construction contended for by the suppliant; they are a public board, originally constituted by 2 W. & M. c. 12; 7 Wm. 4, c. 3 transferred contracts with the Postmaster-General to the Admiralty; but the arrangement and control of the mails remained in the Postmaster-General, and this power was expressly confirmed by 7 Wm. 4 & 1 Vict. c. 33. But in 1860, by the 23 Vict. c. 6, all contracts were again transferred to the Postmaster-General. The present contract was made in 1859, and by the third plea all the breaches are stated to have occurred in June, 1863, so that they were after the contract had been transferred. But independently

(1) 1 Wms'. Saund. 320 *a*.
(2) 7 Rep. 9 b.
(3) 2 W. Bl. 1312.
(4) 6 T. R. 570.
(5) 5 Q. B. 671.
(6) 5 Q. B. 685.
(7) 4 H. L. C. 624.
(8) 1 T. R. at p. 176.
(9) 5 H. L. C. 811.
(10) 18 C. B. (N. S.) 278.

1865

CHURCHWARD v. THE QUEEN.

of that, it would be very unlikely that there would be an intention to bind the crown unqualifiedly. Moreover, looking at the position of the contracting parties, the whole contract is contingent on a fund being provided to carry it out. *Gurney* v. *Rawlings* (1); *Dawson* v. *Wrench* (2); and *Hallett* v. *Dowdall* (3), shew the existence of a fund would be a condition precedent to the right to recover at all. To put any other construction would have the effect of withdrawing all control from parliament, and enable the parties by an implication to obtain indirectly what parliament has forbidden; for, no doubt, were this Court to say there was here a perfect obligation on the part of the crown, parliament would feel bound to find money to discharge the obligation; and by s. 14 of 23 & 24 Vict. c. 34, on the recovery of a judgment in a petition of right, the Treasury is to satisfy it (if not a debt by the crown in its private capacity) out of public moneys in its hands.

As to the third plea, the petition is bad for not shewing that parliament had provided the money; but the plea negatives this, and is therefore an answer to the petition, shewing as it does that by the two acts mentioned parliament had appropriated certain sums to the postal service, and forbidden that any of the money voted shall be applied in any way to any claim founded on this particular contract. The two acts cover the whole period of the alleged breach, so that it is impossible, as far as payment is concerned, that there should be a perfect obligation to make payment; and inasmuch as the damages sought to be recovered are a mere substitution for payment, it follows that a judgment in favour of the suppliant could only be satisfied out of funds which parliament has expressly enacted shall not be so appropriated. Now the 23rd and 24th Vict. c. 34, directs by ss. 13 & 14, how judgments against the crown on a petition of right are to be satisfied, but by s. 7 it is expressly provided that no sum is to be payable under the machinery of the act which would not have been otherwise payable. How could it be wrongful in the commissioners not to send the mails by the petitioner when they were expressly forbidden to apply any of the parliamentary vote to paying him for his services?

(1) 2 M. & W. 87. (2) 3 Ex. 359; 18 L. J. (Ex.) 229.
(3) 18 Q. B. 2; 21 L. J. (Q. B.) 98.

1865

CHURCHWARD v. THE QUEEN.

Lastly, with regard to the question, how far the crown could be held liable for the breach (assuming the implied covenant to exist), Lord Somers, in his argument in *The Bankers' Case* (1); Lord Denman, C.J., in *The Baron de Bode's Case* (2); Erle, C.J., in *Tobin* v. *Reg.* (3); and Cockburn, C.J., in *Feather* v. *Reg.* (4), go to a reasonable length on this point; but within the limit thus imposed, the crown would scarcely be held bound in the present case.

Nov. 24th. *Sir H. Cairns* in reply. There are two breaches alleged in the petition, the neglect or refusal to send the mails by the suppliant, and a larger breach, the refusal to allow him to continue his contract—the first dependent on the construction of the contract, the second independent of that. On the construction of the contract, if the argument of the Attorney-General were well founded, that the whole must depend on the vote of parliament, the most serious consequences would follow; no contractor with any department of the public service would be safe, because the executive might say, we will refuse to employ, and neglect to ask parliament for the vote. But it is a fallacy to say, that the fund out of which the payment is to be made can so far govern the contract, as to make it a condition precedent to every part of the contract that such a fund should be provided. The parties to the contract are the crown and the contractor; and parliament has no control over the matter. It is quite clear as to the extra services there is no limit to the liability of the crown. The clause, 21, that in case of assignment it shall be lawful for the commissioners to determine the contract, shews that in no other case can they do so; and it also shews that the parties contemplated that in other cases the contractor would be entitled to claim damages without any reference to parliament. The crown itself being the contracting party, it is an absurd fallacy to say that the commissioners of the Admiralty cannot bind the Postmaster-General to send the mails. But if there is anything in that argument, it is obviated by the act of 1860, 23 Vict. c. 6, which the Attorney-General relied on, as that act expressly transfers all the Admiralty contracts as to postal service to the Postmaster-

(1) 14 How. St. Tr. 39. (2) 8 Q. B. 284.
(3) 16 C. B. (N. S.) 347; 33 L. J. (C. P.) 203. (4) 12 L. T. (N. S.) 114.

General, so that the present contract must be read as made by him. As to the second breach, which alleges a refusal on the part of the commissioners to allow the suppliant to continue his contract, that is wholly independent of the construction which may be put upon the contract; for if, as may be supposed, a letter had been written by the proper department to the suppliant, saying "we intend to treat this contract as non-existent, you need trouble yourself no further in keeping vessels ready," then, on the principle of *Hochster* v. *De la Tour* (1) the suppliant might at once bring his action, and the breach is well laid; what might be the amount of damages is at present immaterial, though, after the communication supposed, the suppliant would be at liberty to employ his boats on other services; and no doubt, if the jury were convinced that if he had been allowed to go on, parliament would not have paid him, the damages might probably be small. The cases cited, *Gurney* v. *Rawlings* (2); *Scott* v. *Avery* (3), are cases having no bearing on the present, because in them the remedy was expressly confined to the funds adequate to pay. As to the other two cases, *Aspdin* v. *Austin* (4), and *Dunn* v. *Sayles* (5), it is sufficient to refer to what was said of them by Crompton and Erle, JJ., in *Elderton* v. *Emmens* (6), and the still stronger observations of Erle, C.J., in *M'Intyre* v. *Belcher*. (7)

[COCKBURN, C.J. I feel bound to say that, as to *Aspdin* v. *Austin*, under the particular circumstances of the case, I think the decision right, and the Attorney-General fully justified in citing it.]

In that view, the particular circumstances of the case are scarcely sufficiently like those of the present to make it any authority. As to the third plea, the enactment in section 15 of the act of 1863, 26 & 27 Vict. c. 99, simply amounts to saying, after the date of June, 1863, nothing shall be paid; but it leaves the contract untouched, probably for the very purpose of allowing the rights of the parties to be litigated and decided by a tribunal more fit than parliament. And if

(1) 2 E. & B. 678; 22 L. J. (Q. B.) 455.
(2) 2 M. & W. 87.
(3) 5 H. L. C. 810.
(4) 5 Q. B. 671.
(5) 5 Q. B. 685.
(6) 4 H. L. C. at pp. 647, & 656.
(7) 32 L. J. (C. P.) at p. 255.

1865

CHURCHWARD v. THE QUEEN.

that is so, the plea is no answer; for it is conceded that, if the petition were founded on the condition precedent that parliament had voted the money, the petition would be bad for not averring it; and the plea, therefore, contains an immaterial allegation. Nor is it any answer to a proceeding for damages, as long as the contract subsists. Moreover, the two statutes leave uncovered part of the time over which the breaches alleged may be assumed to extend. And how can it be any justification for a breach committed before July, 1863 (when the act passed), to say in that month parliament enacted what amounts to forbidding us to pay you? No doubt the 23 & 24 Vict. c. 34, gives no new right; but it is a fallacy to say that, by suing for damages, the petitioner is endeavouring to escape from the control of parliament. Upon the question of voting the amount of damages recovered, parliament will regain its jurisdiction (if it is desirable it should regain it); but possibly the act, being an act of 1860, has no operation on this contract. The last argument, as to the Post Office Act, 1860, at the most, can only amount to a technical objection, which would at once be cured by an amendment, laying the breach by the Postmaster-General instead of the Lords of the Admiralty, and it is perfectly immaterial to the substance of the case.

*The Attorney-General* intimated that he should offer no opposition to an amendment. As he did not understand in the opening that two breaches were relied on, he asked leave to point out that the petition itself speaks of but one breach, "the breach hereinafter mentioned;" and the breach itself is in terms but one.

*Sir H. Cairns.* Whether it be one or two breaches, if any part is sustained, that is sufficient for the petitioner's purpose.

COCKBURN, C.J. The discussion that has taken place, and the elaborate and very able arguments that have been addressed to us, have thrown so much light upon the case, and have tended so completely to dispel any difficulty or doubt which at one time weighed upon my mind, that, however great may be the interest concerned, and the importance of the case, I do not think we shall gain anything by taking further time to consider it.

It is necessary at the outset to look at what is the substance of

this petition of right; and I take it, that the real matter of complaint contained in it is the breach, by the Lords Commissioners of the Admiralty, of an alleged contract to employ the suppliant to carry the mails between Dover and the opposite ports of Calais and Ostend, and also to do and perform certain services connected with and subordinate to that which was the main and principal contract. When we come to look at the contract, in order to weigh the allegation upon which the petition mainly relies, namely, the obligation to employ Mr. Churchward in the manner alleged in the petition, we shall find that the contractor, in consideration of certain sums to be paid to him—in the first place a subsidy, as it is called, of 18,000*l.*, and also minor sums incidental to the subordinate services—binds himself to the commissioners to provide and maintain certain steam-vessels of given tonnage and power, and to cause those vessels to make certain specified voyages between the ports named, and to convey in those vessels the mails which shall be required to be conveyed between those ports. He engages also to do certain other things in immediate connection with and in subordination to this, the main and principal contract. In the first place, he is to provide vessels, when required, for the passage of distinguished persons. He is to provide one of these vessels specially for the transmission of the China and Bombay mails, when those mails happen to be too late for the ordinary packet. He is to keep in constant readiness a steamer at Calais, to land passengers and mails when the state of the tide does not allow of other communication with the harbour. All those things, however, are subordinate to the main purpose of the contract. On the other hand, the commissioners, in consideration of the services thus to be rendered by the contractor, engage to pay him a subsidy of 18,000*l.* per annum out of funds to be provided by parliament for that purpose.

The suppliant alleges in his petition that the commissioners have broken their contract, in that they have not employed him to carry the mails, or to perform those other services, whereby he has been prevented from earning the remuneration that otherwise would have accrued to him from the performance of those services. On the part of the crown, this obligation of the commissioners to employ Mr. Churchward for the purpose of performing the services

1865

CHURCHWARD v. THE QUEEN.

in question is denied; and we are to determine whether, in this contract, there is, either by express provision or by implication, any such obligation on the part of the Lords Commissioners of the Admiralty, who, for this purpose, must be taken to be the agents of the crown. I have stated the substance of the contract; and it appears clear, when the contract is looked at, that there is no such express covenant. But then, on the part of the suppliant, it is alleged that, although there may be no such covenant or undertaking expressed, it must necessarily be implied from the other terms and tenor of the contract itself; and it appears to me that that is *the* question, and the *only* question which we are called upon to determine. Sir Hugh Cairns, in his very able argument addressed to us to-day, has started what appears to me to be an entirely new point, and which I did not understand him to make upon the former occasion, namely, that the complaint in this petition was not founded on the absence of employment in respect of the carriage of the mails alone, but that there was also a complaint for a breach of contract in not allowing the petitioner to perform all the matters which he had bound himself by this contract to perform. I must say that the larger breach appeared to me to be only an amplification of the main and more material one, which was the refusal to employ him to carry the mails. But taking it in its largest and widest sense, giving it the full construction for which Sir Hugh Cairns contends, it can amount to no more than this—that whereas the suppliant has engaged to perform certain services in respect of which he is to be employed by the commissioners, and, in consequence of which employment, he is to gain a certain remuneration, the commissioners have not employed him in respect of every one of those services, which, in succession, are enumerated in the contract. You can put the statement of the second breach no higher, and you can give it no greater effect; therefore we are brought again to the same question which we were considering before, namely, whether there was any obligation on the part of the commissioners to employ Mr. Churchward to carry the mails, or to employ him to do other services, which go, in the aggregate, to make up the consideration for which he was to receive the subsidy of 18,000*l.* a year.

The question therefore is whether on this contract, there being

no such condition in terms expressed, it ought properly and reasonably to be implied. Because if it ought not, if there was no obligation upon the commissioners to employ Mr. Churchward in respect of those services which he bound himself by his covenants to perform, this petition, which is based entirely upon the assumption of that obligation, of necessity fails.

In considering this subject, I must begin by saying that I entirely concur with the position taken by the learned counsel for the suppliant, that although a contract may appear on the face of it to bind and be obligatory only upon one party, yet there are occasions on which you must imply—although the contract may be silent—corresponding and correlative obligations on the part of the other party in whose favour alone the contract may appear to be drawn up. Where the act to be done by the party binding himself can only be done upon something of a corresponding character being done by the opposite party, you would there imply a corresponding obligation to do the things necessary for the completion of the contract. As in the case cited by Sir Hugh Cairns—if A covenants or engages by contract to buy an estate of B, at a given price; although that contract may be silent as to any obligation on the part of B to sell, yet as A cannot buy without B selling, the law will imply a corresponding obligation on the part of B to sell. (1) So, if a man engages to work, and render services which necessitate great outlay of money, time, and trouble, and he is only to be paid by the measure of the work he has performed, the contract necessarily presupposes and implies on the part of the person who engages him an obligation to supply the work. So, where there is an engagement to manufacture some article, a corresponding obligation on the other party is implied to take it, for otherwise it would be impossible that the party bestowing his services could claim any remuneration. Numerous other cases might be put of the same kind; but in all these instances, where a contract is silent, the court or jury who are called upon to imply an obligation on the other side which does not appear in the terms of the contract, must take great care that they do not make the contract speak where it was intentionally silent; and, above all, that they do not make it speak entirely contrary to

(1) *Pordage* v. *Cole*; 1 Wms' Saund. 319 *l*.

1865

CHURCHWARD v. THE QUEEN.

what, as may be gathered from the whole terms and tenor of the contract, was the intention of the parties. This I take to be a sound and safe rule of construction with regard to implied covenants and agreements which are not expressed in the contract.

Taking that rule as a guide on the present occasion, I proceed to consider how far in this contract we are at liberty or called upon to imply the covenant on the part of the commissioners, which it is necessary that the suppliant should establish in order to maintain his petition. The case may here be looked at in two points of view, either with the addition of the circumstance that the fund out of which the contractor was to be remunerated is to be found by parliament, or, without the addition of that very important and material circumstance. Now the way in which the case was put, as I understood it, on the part of the suppliant, independently of the question of the fund, is this:—The contractor is under the necessity, in order to satisfy the exigency of his obligations, to provide and equip vessels at great cost, he must incur serious responsibility and risk, he cannot get paid unless he actually performs his contract by conveying the mails, therefore, although there is no express stipulation that the commissioners shall employ him, that must be implied; because, otherwise, his position will be one in which a contractor ought not justly and equitably to be placed. At first sight, there is something very taking and striking in that argument; but I think it fails when you come to look into the terms of the contract; because it is founded upon an hypothesis which cannot be supported, and upon a reading of the contract which appears to me to be altogether inadmissible. The way in which Sir Hugh Cairns invites us to read this contract, is, not that the contractor is bound to convey all mails which he shall be required to convey, but that he is bound to convey all mails which the Post Office shall require to have conveyed, whether by him or whether by anybody else, between the port of Dover and the ports of Calais and Ostend. I think this is altogether a mistaken reading of the contract. It would involve this extraordinary consequence, that if a state of war arose in which it was inexpedient to send and transmit our communications with the continent other than in vessels of war, there

would be a breach of this contract. Or, if it was thought more convenient to carry on the postal communication of this country by some other route, again there would be a violation of this contract. I think that the true construction of the contract is simply this, that the Post Office, or the Lords of the Admiralty, or other contracting party, are entitled to exact from the contractor that he shall have his vessels in readiness according to the terms of the contract, and that he shall convey all the mails which they shall require him to convey between the ports named. If that be so, the argument as to the necessity of implying this covenant, on the ground that otherwise Mr. Churchward would never be in a position to obtain the remuneration which is conditioned upon the performance of the service contracted for by him, fails. If indeed the contract had been to pay, not in the shape of an annual subsidy, but according to the number of mails conveyed, then we might have been at liberty and perhaps bound to imply the covenant which is contended for on the part of the suppliant; because in that case he might have had his vessels in readiness, and have incurred all the attendant expenses, and although at all times ready and willing to fulfil his part of the contract, yet inasmuch as his remuneration was to depend, not on his being constantly ready and willing, but on the fact of mails being conveyed by his vessels, it would be but reasonable to infer a covenant to employ him. But according to my view of the present contract, so long as Mr. Churchward was prepared to carry out all the terms of the contract to which he had bound himself, I think (supposing the question of the fund for payment had not been involved), he would be entitled to insist upon the performance of the contract, so far as the payment of his remuneration was concerned, at the end of the year, although only one mail bag might have been required to be carried by him in the course of a week, or even if none at all had been sent to him by the Post Office requiring him to convey it. I say therefore, in the first view of the case, it is unnecessary to imply any covenant to employ.

Then arises the second point, how far this view of the case is influenced by the circumstance, that the remuneration of the contractor, which would be obtained by the mere performance by him of these obligations in the contract which he takes upon himself, depends

1865

CHURCHWARD v. THE QUEEN.

on the will of parliament to find the funds: for that may make a very important difference in the conclusion at which one would arrive, as to whether this covenant ought to be implied. Both parties have relied strongly upon this condition of the contract. Sir Hugh Cairns puts it in this way. The contractor has relied entirely upon the good faith and high sense of national honour with which parliament always acts when called upon to make good the engagements of the ministers of the crown and the heads of public departments; and he says, that if this service had been allowed to be rendered, parliament would have found the funds; but if not, parliament could not be expected to find the funds; therefore, he argued, if I understand him, the covenant must be implied on the part of the Lords of the Admiralty, to permit the contractor to perform these services, in order that he may be in a position to go before parliament, and claim at their hands the funds out of which he may be remunerated. I think that argument may be, to some extent, met by the construction which I feel myself called upon to put on this contract; for, if I am right in supposing that the contractor fulfils all that is required of him, when he has his vessels equipped and ready, and is prepared to carry out his contract, I think he would have no feeble case to submit to the consideration of parliament, if he could have alleged that he had done all that was required to be done on his part, and it was through the default of those who had contracted with him that he had been unable to perform the services, and so put himself in a condition to present his case, in full force and effect, for the consideration of parliament. On the other hand, it may be said certainly, that, notwithstanding this, it is impossible not to feel that a man who has a claim to submit to the consideration of parliament, and who expects remuneration, in respect of that claim, at the hands of parliament, stands in a much better position when he can allege he has performed the service, than a man who says, "I was at all times ready and willing to perform it;" and, therefore, it may be, if there were no answer but that already given to the argument, on the part of the suppliant, it might be entitled to very great weight. But then we must look, on the other hand, to see what are the consequences which would follow from such an implied obligation as the one which it is said we must impose upon the Lords of

the Admiralty. These were pointed out by the Attorney-General in the course of his powerful address the other day, and I think they are very well worthy of the most serious consideration. We start with this, that there is involved in this contract the possibility of parliament refusing to find the fund. The commissioners do not make themselves, nor their department, nor the crown, answerable for a default in the payment of the 18,000*l.* a year to the contractor. It is left to parliament to find the funds, and in that is necessarily involved the possibility of parliament, in the exercise of its absolute power, refusing so to do; and, in point of fact, we cannot shut our eyes to the fact, because I think it sufficiently appears from this record and the acts of parliament referred to, that parliament has refused to find the funds. In two successive appropriation acts parliament has not merely omitted to find a fund applicable to this purpose; but it has had the case of Mr. Churchward before it, and has cautiously provided for the exclusion of the satisfaction of his claim from the fund which it has appropriated for the postal service.

Therefore, when we come to consider whether there is to be implied from the other terms of this contract, an intention on the part of the Lords of the Admiralty to bind the crown in the event of parliament not providing the funds, let us see what the position of all parties concerned would be, if, after parliament had refused to find the funds to satisfy the exigency of this contract, the Lords of the Admiralty had taken upon themselves, nevertheless, to continue to employ the contractor. In the first place, the government would have put itself in a state of antagonism to parliament, inasmuch as it would have set the authority of parliament at defiance. In the second place, the head of a public department would continue to employ a public contractor, without the means of paying him; for when it is said that possibly in the future parliament may find funds, one can hardly suppose that a public minister would be warranted in assuming such a possibility, when, so far as experience has shewn, parliament has refused to find the funds; and I must say, it appears to me that to employ a public contractor without the means of payment, even if he were willing to be so employed, would be a course of proceeding altogether derogatory to the dignity of the crown and to the honour of the

1865

CHURCHWARD v. THE QUEEN.

country. In the third place, the contract certainly could not be enforced under such circumstances. I mean enforced by the public department. Suppose that parliament refused for the coming year to find the fund wherewith to remunerate Mr. Churchward, he under such circumstances would be entitled to say "As I cannot look to you the other contracting parties, as I am not entitled to look to the crown, as I can only look to parliament, and parliament refuses to find the funds to pay me, I am not bound to go on." I take it, if the other contracting parties then endeavoured to enforce the contract, equity would relieve the contractor from the obligation to obey it; and if an action were brought at law, I doubt very much, indeed, whether a court of law would not say that the providing of the fund by parliament was a condition precedent to the fulfilment or necessity of fulfilling the contract. At all events, Sir Hugh Cairns himself admitted, if an action at law were brought, it is impossible to suppose that any jury would give the public department, at whose instance such an action was brought, anything in the shape of damages beyond the smallest coin. Therefore, the result is this, that in this case the Lords of the Admiralty, upon parliament refusing to find the funds, would not have been in the position at all to enforce the performance of this contract. Then, observe what would be the state of things. While it is clear that the Commissioners of the Admiralty would not have been in a position to enforce this contract, it is alleged that the contractor could nevertheless enforce it against them. That state of things is one which it is hardly possible to suppose can ever have been intended, or as to which we ought to imply a covenant. I am very far, indeed, from saying, if by express terms, the Lords of the Admiralty had engaged, whether parliament found the funds or not, to employ Mr. Churchward to perform all these services, that then, whatever might be the inconvenience that might arise, such a contract would not have been binding; and I am very far from saying that in such a case a petition of right would not lie, where a public officer or the head of a department makes such a contract on the part of the crown, and then afterwards breaks it. We are not called upon to decide that in the present case, and I should be sorry to think that we

should be driven to come to an opposite conclusion. In this case there is no express contract or obligation, and I have pointed out the inconveniences that would arise if such a contract were to be implied or expressed; and looking at all these circumstances, it is impossible for me to suppose that the Lords of the Admiralty ever intended to enter into such an engagement. If they had been expressly asked to do so, would any reasonable man, looking at the obvious, and I may say the anomalous and startling consequences which would follow, suppose that the Lords of the Admiralty would allow such a contract to go forth? They certainly would not: and if they would not, how can we hold that they intended to imply such a contract, when we feel thoroughly convinced they would not have consented so to covenant? I think, therefore, the Court would not be justified in introducing such a term into the contract, as the contract is wholly silent as to it. I think if we did so we should be violating that rule with which I started, which I think is the common rule of construction, namely, that you are not lightly to assume what is not expressed, still less are you to imply that which the Court must be convinced, from the whole terms and tenor of the contract, the parties never intended. The whole case turns on the question of whether there was this implied engagement on the part of the Lords Commissioners of the Admiralty to employ Mr. Churchward. If there is no such engagement expressed, we are not at liberty to imply it, and consequently the petition fails. I agree that, if there had been no question as to the fund being supplied by parliament, if the condition to pay had been absolute, or if there had been a fund applicable to the purpose, and this difficulty did not stand in the petitioner's way, and he had been throughout ready and willing to perform this contract, and had been prevented and hindered from rendering these services by the default of the Lords of the Admiralty, then he would have been in a position to enforce his right to remuneration. But then his petition and his ground of complaint must have assumed a wholly different shape. He must then have alleged a performance, or a readiness to perform on his part, and a right to receive remuneration. Unfortunately, he is not in a position to do that; and parliament having omitted and refused—at all events omitted—to

1865

CHURCHWARD v. THE QUEEN.

provide the fund, and there being therefore no fund out of which he can be paid, and no means of obtaining redress in that shape, he is compelled to found his complaint upon the assumption of a covenant to be implied from the terms of this contract, a covenant which I think cannot, according to sound and reasonable rules of construction, be implied. Upon these grounds, therefore, I think the petitioner fails, and our judgment should be for the crown.

MELLOR, J. I am also of opinion that our judgment should be for the crown. The articles of agreement are made between the commissioners for executing the office of Lord High Admiral, and the contractor, Mr. Churchward. We have to ascertain from the nature of the instrument, the parties to it, the subject matter of the contract, and the expressions actually used in it, what was the meaning and intention of the parties; and, in order to ascertain that, we must not only consider the actual language and expressions contained in the instrument, but all that must necessarily be implied from the scheme of the instrument and the expressions used in it; and if we can see that certain stipulations and conditions must have been necessarily intended by the parties, although not fully expressed in words, we must give effect to such intent. Now, if we look to the articles of agreement themselves, the consideration which is expressed upon the face of them is, "that in consideration of the payments hereinafter stipulated to be made to the contractor, the contractor undertakes to convey the mails, despatches," and so on; that is, as I read it, such mails and such letters and despatches as may be required for the purposes of the Government to be conveyed by the means which he undertakes to provide, viz., by a number of vessels of a certain character and capacity which are specially to be provided for the purpose of performing this duty; and on the other side, the commissioners, in consideration of the premises, and of the performance of those engagements entered into on the part of the contractor, undertook to pay by bills of seven days' date, "a sum out of moneys to be provided by parliament after the rate of 18,000*l.* per annum by quarterly payments, and with a proportionate part thereof, should this contract terminate on any other day than a day of payment." Therefore we find that the considera-

tion for the performance of the service by the contractor is the payments stipulated in the contract to be made. Now, as I have said, the payment is stipulated to be made "out of moneys to be provided by parliament," and it is not contended by Sir Hugh Cairns, that, without alleging that money had been provided by parliament, he could succeed in maintaining that on a breach of that contract he would be entitled to the 18,000*l.* But, he says, "Although I quite admit that it was at the will of parliament to provide the 18,000*l.*" which in another part of the agreement is called a "subsidy," "still, I contend, from the nature of the instrument and the expressions used in it, and the duties to be performed, so long as the contractor is able and willing to perform the duties which he has undertaken, there is, on the part of the crown an engagement, not expressed, but implied necessarily, that he should be permitted to continue to perform that service: not only to provide the vessels, but to carry the mails;" and he says the incidental considerations to Mr. Churchward, were not only the subsidy of the 18,000*l.* which he admits was to depend upon the will of parliament, but also certain other incidental advantages which would be likely to arise from the mere fact that he was entrusted by the Government and by a particular department of the public service to carry those mails. I have only to observe upon that, there is nothing on the face of the instrument which shews that there was any such consideration on the part of the crown. Very likely it entered into the mind of Mr. Churchward when he was making this engagement with the Lords of the Admiralty, that he would derive some incidental advantages from the contract; but unless we can find something on the face of the instrument which shews that the Lords of the Admiralty contemplated those advantages as part of the renumeration which he was to receive, I think it would be a forced construction to imply a contract on their part, that whatever change of circumstances might arise, whatever fresh discoveries in science, the crown must be bound for the term of eleven years to send through Mr. Churchward, and by the means which he stipulates to provide, all the letters and all the despatches which the Government might require to send between the ports mentioned in the agreement.

Now, that appears to me to be a very strong implication indeed;

1865

CHURCHWARD v. THE QUEEN.

and when we are considering whether there is an implication of something which is not expressed in the instrument, it is very material to see who are the parties in it, and what is the nature of the contract. In the ordinary contracts for work and labour, and other cases which might be suggested, the considerations which determine the construction differ materially from those which are applicable to an agreement of this description, providing for a great department of the public service, and made between persons filling the situation of the Lords Commissioners of the Admiralty acting on behalf of the crown.

Unless we can see our way to the conclusion that there must necessarily be implied on the part of the Lords of the Admiralty, on behalf of the Government, a contract that they will send these mails for a period of eleven years, the argument for the suppliant fails; because, whether or not there be two breaches alleged in this petition of right as contended for by Sir Hugh Cairns, or whether there be only one, and whether the one relied upon by Sir Hugh Cairns be merely an amplification of the substantial breach alleged, all depends on the question of whether or not there is to be a contract implied that the Lords of the Admiralty will, for the period of eleven years, continue to send their mails in the mode provided by Mr. Churchward. It is perfectly immaterial, for the purpose of the maintenance of the action, whether there be one or two breaches. They both depend on the fact of whether or not such a contract as that which is suggested by Sir Hugh Cairns can be implied under the circumstances, and the only difference between the two breaches—if there are two breaches assigned—is that it may affect in some measure the damages which might be recovered; that is to say, treating it as a present breach and bringing his action at once, the suppliant would be entitled (provided the crown is bound under an implied contract of the commissioners) to recover such damages as a jury would think proper to give, under the circumstances, for the loss of the incidental advantages, and for the chance of going before parliament, and asking parliament to give him the subsidy by reason of his readiness to perform the service contracted for. If, on the other hand, instead of declaring and treating it as a present renunciation of the contract on the part of the commissioners

which at once would prevent him from performing it, he simply says he was ready and willing during the time to do all things which were required of him to do, and that they would not send the mails by him, it may be, that waiting for a longer time, he might recover higher damages than he would get by treating it as an immediate breach of the contract; because, in the one case he would have kept his boats waiting the disposal of the Admiralty, and in the other case he would have employed his boats for some other purpose, which would go in mitigation of damages. Therefore, whether there be one breach or two, the question still seems to me to depend on the same consideration, namely, whether we can imply on the part of the Lords of the Admiralty, that they did undertake that the contractor should carry all the mails that they should require to send for the period of eleven years. I am bound to say that I feel myself unable to come to any such conclusion; on the contrary, it appears to me that I should be doing violence to the intention of the parties to the agreement manifest on the face of the instrument, if I were to imply any such contract as that suggested, the obvious effect of which would be to render the crown liable in damages, and to withdraw from the control of parliament the remuneration to be paid to the contractor. Therefore, without entering into other considerations, which it is unnecessary to do after the observations of my Lord Chief Justice, I base my judgment on this ground, that I cannot, under the circumstances of the case, imply such a covenant as Sir Hugh Cairns contends for on the part of the suppliant; and if that cannot be done his whole argument fails.

SHEE, J. (after reading the petition) proceeded:—To this petition the Attorney-General demurred, and unless there be in the agreement set forth in the second plea a covenant expressed or implied by the commissioners to do that which this breach alleges, and they admit, they have not done, or not to do that which it alleges, and they admit, that they have done, the suppliant has no cause of complaint, his petition is bad in substance, and his demurrer to the second plea fails, and on that demurrer, and on the demurrer of the Attorney-General to the petition, judgment must be given for the crown.

1865

CHURCHWARD v. THE QUEEN.

No such covenant on the part of the commissioners as the suppliant alleges to have been broken is set forth in his petition as the consideration, or part of the consideration, for the covenants to be performed by him, and the whole agreement being before us on the second plea, it is plain that unless such a covenant on their part *can be* implied from the covenants to be performed on his part, no such covenant exists. The covenant of the suppliant —in which the covenant, the breach of which is complained of, has been said to be implied—is this; he will convey in steam vessels duly equipped and maintained, and kept in readiness by him, her Majesty's mails *required by the commissioners or by the Postmaster-General to be conveyed* from Dover to Calais and back, and from Dover to Ostend and back. It has been suggested by the learned counsel for the suppliant that this covenant is a covenant to carry all the Queen's mails between those ports which the commissioners or the Postmaster-General might require to be carried, and not such only of the Queen's mails as the suppliant might be required by them to carry. I think though the letter of the covenant be so, that the covenant has not the meaning suggested; but if it had, I do not see how that apparently larger liability could import an agreement on the suppliant's part to carry any mails but such as the commissioners or the Postmaster-General should require him to carry, or imply a covenant on the part of the commissioners to give him the mails to carry; or what cause of complaint he would have if they—not having failed in the performance of their covenant to make him the payments stipulated—should not give him the mails to carry. If they gave him the mails to carry, he would incur a certain expense in carrying them; if they did not give him the mails to carry, his expenses would be something less. If, on the other hand, his covenant is limited to the carrying of such mails as he should be required by the commissioners or the Postmaster-General to carry, the covenant on their part, which is said to be implied in his covenant, would be inconsistent with, and repugnant to its terms. Now, that this covenant is limited to the carrying of such of the Queen's mails as he might be required to carry, is to my mind clear. It would be no plea to a claim by him for the stipulated payment, that he had not in fact carried the mails, unless the plea alleged that they had been offered to

him to carry and that he had refused to carry them. He would, as it seems to me, on the true construction of this agreement, give to the commissioners abundant consideration, nay, the greater part of the consideration in respect of which the stipulated reward is to become payable to him, though he should not be required by them or the Postmaster-General to carry, and should not have carried any of the mails between the ports named.

In addition to the covenant in which the covenant of the commissioners to allow him to carry the mails is said to be implied, the contractor enters into six other distinct and very onerous covenants, to which, as they have already been mentioned by my lord, I will not more particularly refer. Every one of these might be performed without his actually carrying any of the mails. The performance of them, though he carried none of the mails, would involve a risk and an outlay on his part, for which probably the stipulated payments would not be more, or much more than an adequate remuneration; and there seems, therefore, no equitable, or to him profitable ground, for implying in his covenant to carry between the ports mentioned the mails which should be required by the Commissioners of the Admiralty or the Postmaster-General to be carried, a covenant by them on behalf of the crown to give him the mails to carry. If the suppliant's stipulation had been to carry the mails, and to be paid, not a fixed gross sum per annum, but for every voyage in which the mails were carried by him, an agreed sum, not to exceed in the whole 18,000*l.* per annum, there would be the same ground for implying a covenant on the part of the commissioners to give him the mails to carry, as there was in the case of *Pordage* v. *Cole* (1), for implying on the part of the man who was to receive a sum of money for his land, a covenant to convey the land to him from whom he was to receive the money, as there was in the case of *Emmens* v. *Elderton* (2), for implying a covenant on the part of the company, with whom an attorney had agreed to accept for his professional services a salary of 100*l.* per annum, a covenant to retain and employ him for a year. In those cases the consideration and motive for covenanting to pay the money, and the consideration and motive for the agreement to render professional services for a year, would have been

(1) 1 Wms'. Saund. 319*l.* (2) 4 H. L. C. 624.

1865

CHURCHWARD v. THE QUEEN.

wholly defeated, if a covenant had not been implied in favour of the vendee, that the vendor would convey: in favour of the attorney, that the company would employ him for a year. The case between the suppliant and the crown stands on a very different footing, and must, like the cases of *Aspdin* v. *Austin* (1), and *Dunn* v. *Sayles* (2), be determined on the special character of the contract before us, and of which the chief feature is the payment of the suppliant out of funds to be provided by parliament. If the necessities of the post-office service had been such as to require a new contract with another contractor for ships of greater speed and burthen, and a contract differing only in those particulars from the one declared upon had been entered into by the commissioners within a month of its date, and the new contractor had been employed to carry all the mails, and the suppliant none of them, he would have been entitled to every shilling of the money applicable to his contract which might be provided by parliament, and the commissioners would have observed to the letter the covenants into which they, on behalf of her Majesty, had entered with him. The case of *Hochster* v. *De La Tour* (3), referred to by Sir Hugh Cairns this morning, and also in his argument the other day, was the case of a person hired for a period, and for a service requiring a preparation and an outlay on his part, at weekly wages, who had been dismissed, or rather turned off, before his services had commenced. It was held, there having been a contract to employ him, and a refusal to do so, that he might sue for damages for not having been employed, although the time at which the payments in respect of the services contracted for were to be paid had not arrived. The difference between that case and the present is, that there the rejection beforehand of the plaintiff's services was held to be a ground of action, because the not employing him, or not continuing to employ him, had he entered upon the service, would have been a breach of the agreement with him; whereas here, the not allowing the suppliant to carry the mails, was not—unless, indeed, a covenant to allow him to carry them could be implied—a breach of the contract made with him. For these reasons, as it seems to me, our judgment on the de-

(1) 5 Q. B. 671.
(2) 5 Q. B. 685.
(3) 2 E. & B. 678; 22 L. J. (Q. B.) 455.

murrer to the petition, and on the demurrer to the second plea, ought to be for the crown.

The Attorney-General pleaded thirdly. [The learned Judge read the third plea.] To this plea the suppliant has demurred, on the ground that the provision of moneys by parliament was not a condition precedent to the performance of the contract on the part of the commissioners, and therefore, that the absence of such condition cannot be set up as a justification of their breach of the contract. I am, however, of the opinion, for the reasons already given, that the covenant of the commissioners to pay to the suppliant out of the moneys to be provided by parliament, after the rate of 18,000*l.* per annum, is the only covenant into which they have entered, and that it is a covenant to pay him that sum, if, and only if, it should be provided by parliament. As matter of ordinary law, between subject and subject, a covenant so guarded would be held to be binding on the covenantor only in the event of his being supplied with funds from the source which the covenant had indicated. The cases cited by the Attorney-General of *Gurney* v. *Rawlins* (1), *Dawson* v. *Wrench* (2), and *Hallett* v. *Dowdall* (3), are decisive on this point. In the case of a contract with commissioners on behalf of the crown to make large payments of money during a series of years, I should have thought that the condition which clogs this covenant, though not expressed, must, on account of the notorious inability of the crown to contract unconditionally for such money payments in consideration of such services, have been implied in favour of the crown. The inconvenience suggested by Sir Hugh Cairns as likely to arise from so holding, were it necessary so to hold, could practically have no existence. The condition of parliamentary provision is usually notified to government contractors, for services of a continuing character, by covenants like the one before us. When not so notified, the occurrence of the alleged inconvenience—such are known to be the justice and honour of parliament—is too improbable to induce any of the Queen's subjects to forego when the opportunity offers the advantages of a good government contract. It was beyond the power of the commissioners, as the suppliant

(1) 2 M. & W. 87. (2) 3 Ex. 359; 18 L. J. (Ex.) 229.
(3) 18 Q. B. 2; 21 L. J. (Q. B.) 98.

1865

CHURCHWARD v. THE QUEEN.

must have known, to contract on behalf of the crown, on any terms but those by which the covenant is restricted and fenced. I am of opinion that the providing of funds by parliament is a condition precedent to it attaching. The most important department of the public service, however negligently or inefficiently conducted, would be above control of parliament were it otherwise.

Sir Hugh Cairns has this morning pressed upon us the argument, that if the covenant of the commissioners to employ the suppliant were conditional on the providing by parliament of the funds required for his payment, the clause which enables the commissioners to determine the contract without notice, in case of its assignment by the suppliant, would be unnecessary. But the funds for services of this kind, are voted and appropriated before the services to which they are applicable are rendered; and that clause, as it seems to me, is intended chiefly, if not wholly, to apply to the case of the suppliant's contract being assigned by him during a period for which parliament has made pecuniary provision.

I think also, that the enactment in one or both of the acts pleaded by the Attorney-General, "That no part of the sum of 950,000*l.* voted by parliament in the session of 1863 to defray the charges of the Post Office Packet Service shall be applicable, or applied towards making any payment in respect of the period subsequent to the 20th June, 1863, to Mr. Churchward, or to any person claiming under his contract of the 26th April, 1859, with the Commissioners of her Majesty's Admiralty," is *proprio vigore*, and, independently of the construction of the contract, a sufficient answer to this petition. The Commissioners of the Admiralty could not possibly bind her Majesty by contracts inconsistent with, nor can her Majesty possibly do right to her subjects, in violation of the express provisions of an act of parliament. I am of opinion, therefore, that judgment on this demurrer to the third plea must also be for the crown.

LUSH, J. I am also of opinion that judgment should be for the crown. The question, and the only one for our decision, is whether there is a contract on the part of the crown to employ Mr. Churchward to carry the mails for the eleven years during which the

contract was to continue, and that without qualification and condition. Now it is admitted that there is no express contract to that effect. The only contract on the part of the crown is, that in consideration of Mr. Churchward performing the covenants and agreements on his part, which are in substance that he will always have vessels ready to carry the mails, and will carry such mails as he may be required to carry, the crown will pay him 18,000*l.* a year for eleven years, out of funds to be provided by parliament, that is, if parliament will provide the money. Then it is said, out of some parts or other of this agreement we are to imply a covenant that the crown would employ him during the whole of this time, and, as I said before, without any qualification or condition. In dealing with formal contracts containing stipulations on both sides, in which each party professes to express in plain language what obligations he means to undertake, I think the Court ought to be extremely cautious before they arrive at a conclusion that the parties intended more than they expressed. In order to raise what is called an "implied" covenant, I apprehend the intention must be manifest to the judicial mind, and there must be also some language, some words or other, capable of expressing that intention,—not that any formal technical phraseology is required, but you must find words in the instrument capable of sustaining the meaning which you seek to imply from them. Now, if there had been any words in this contract which would even admit of the construction contended for, I should certainly have sought for some other meaning, and have adopted almost any other construction rather than that; because I think it is in the highest degree improbable that any department of the public service would pledge the crown to a given course of action for a series of years, in the management of any branch of the public service, especially one for which they have to go to parliament year by year for supplies, without at all events reserving the right of putting an end to it, if the public service required it, or if parliament disapproved of it. Another very serious objection in my mind, against implying such a covenant in the present case, is, that it would be entirely inconsistent with the express contract on the part of the crown, because a covenant of that kind would have made the crown liable to pay, in the shape of damages, for not

1865

CHURCHWARD v. THE QUEEN.

having the services performed, what the crown by the same contract protected itself from being compelled to pay, even if the service had been performed. Therefore, had there been (as I said before), any words whatever which would have borne the construction contended for, if they were susceptible of any other meaning, I should have thought that other was the proper meaning to be put upon them. But when I come to look at the contract, there is not a single expression or phrase or word, upon which any such question of construction, in my view, can be raised. All that the crown engages to do, is, as I have already said, to pay in consideration of Mr. Churchward's performing his part of the contract, provided parliament supplies the money. And I am quite satisfied, that all those contracting on behalf of the crown intended to say was, "the whole contract on our part was, that it shall be contingent for its continuance on the continued sanction of parliament, and when that sanction was withdrawn, our contract on the part of the crown came to an end;" and, I think by necessary consequence, the contract on the part of the contractor also came to an end. For these reasons, I am of opinion our judgment should be for the crown.

*Judgment for the crown.*

Attorneys for suppliant: *Wilkinson, Stevens, & Wilkinson.*
Attorney for crown: *Ashurst,* Solicitor to P. O.

END OF MICHAELMAS TERM.

# CASES

DETERMINED BY THE

# COURT OF QUEEN'S BENCH

AND BY THE

# COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER

IN AND AFTER

## HILARY TERM, XXIX VICTORIA.

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### THE QUEEN *v.* THE INHABITANTS OF THE PARISH OF ASHBY FOLVILLE.

1866
*Jan.* 27.

*Highway—Liability of Parish to Repair Roads in another Parish—Prescription.*

To an indictment against the inhabitants of the parish of A. for the non-repair of a highway, the defendants pleaded, that from time immemorial, the inhabitants of the parish of G., in consideration of levying and receiving rates on certain lands in the parish of A. adjoining the highway, have repaired and ought to repair the highway; to which there was a replication that the said agreement had been determined by notice. On demurrer to the replication:—

*Held*, that the prosecutors were entitled to judgment: for that the consideration was insufficient to support the alleged liability of G., as neither could the consideration be enforced, nor could it be immemorial, for it must have arisen since the statutes creating the power to levy rates. That the alleged liability, therefore, amounted to no more than an arrangement between the two parishes which could be put an end to at any time.

*Quære*, whether, in point of law, a parish could be bound by prescription to repair highways in another parish.

106 B 474

THIS was an indictment preferred by the Melton Mowbray District Highway Board, at the Leicestershire Quarter Sessions, against the inhabitants of the parish of Ashby Folville, for the



340.766.7

1866

THE QUEEN v. ASHBY FOLVILLE.

non-repair of so much of a certain ancient highway leading from Gaddesby to Rotherby as lies within that parish.

Plea. That as to the said part of the said highway in the parish of Ashby Folville, the inhabitants of the parish of Gaddesby, from time whereof the memory of man is not to the contrary, and by reason and in consideration of levying and receiving from time to time certain rates and charges on and in respect of certain lands in the parish of Ashby, adjacent to the said highway, have repaired, and ought to repair, the said part of the said highway, when and so often as there should be occasion, as the said inhabitants of Gaddesby hitherto were used and accustomed and still of right ought to do.

Replication. That the agreement in the plea mentioned was put an end to and duly determined by notice in that behalf.

Demurrer and joinder.

The court of Quarter Sessions having given judgment for the defendants; error was brought to this Court.

The case was argued in Easter Term, 1865, April 29, by

*Sills* for the plaintiffs in error.

*Merewether*, for the defendants. (1)

The following cases were cited:—*Rex* v. *Stoughton* (2); *Rex* v. *Mayor of Liverpool* (3); *Rex* v. *St. Giles, Cambridge* (4); *Rex* v. *Ecclesfield* (5); *Rex* v. *Machynlleth* (6); *Rex* v. *Eastrington* (7); *Dawson* v. *Willoughby*. (8)

*Cur. adv. vult.*

Jan. 24. The judgment of the Court (Cockburn, C.J., and Shee, J.), was delivered by

COCKBURN, C.J. This was a case arising on an indictment against the defendants, the parish of Ashby Folville, for non-repair of a highway. The defendants pleaded that, as to a portion of the highway in question, another parish, namely, the parish of Gaddesby, had from time immemorial, "by reason and in consideration

(1) The case having been argued before Michaelmas Term, the reporter has no note of the argument.

(2) 2 Wms'. Saund. 159*b* & notes.

(3) 3 East, 86.

(4) 5 M. & S. 260.

(5) 1 B. & A. 348.

(6) 2 B. & C. 166.

(7) 5 Ad. & E. 765.

(8) 34 L. J. (M. C.) 37.

of levying and receiving from time to time certain rates and charges on and in respect of certain lands in the said parish of Ashby, adjacent to the said highway, repaired and were bound to repair the said portion of the highway." To this plea there was a replication, that the agreement in the plea was put an end to and duly determined by notice in that behalf. To this replication there was a demurrer; and judgment having been given thereon for the defendants by the court of quarter sessions, error was brought to this court.

The case was argued before my brother Shee and myself, and after argument we took time to consider, in order to look into the cases, with a view of satisfying ourselves whether there was any sufficient authority for holding that a parish could be liable by prescription, to repair a highway situate in another parish.

The only positive authority for the affirmative that we have been able to discover is to be found in the case of *Rex* v. *Ragley* (1), in the course of which the following passage occurs, apparently as having fallen from Holt, C.J. "The parish, of common right, ought to repair their highway; but by prescription one parish may be bound to repair the way in another parish." The case is, however, so loosely reported that it is difficult to see to what point in the case this dictum can have had reference. No question arose as to the liability of a foreign parish to repair. The case was one in error from a judgment on an indictment at the quarter sessions for non-repair of a highway "between A. and B. in the parish of Ragley," the exceptions being that it did not appear in what parish the way was, as B. alone might be in the parish of Ragley; secondly, that the judgment was "*extrahatur et levetur*," instead of "*levetur et extrahatur*." On this latter exception the judgment was reversed. The dictum in question, therefore, if it ever fell from the Chief Justice, which, looking to the looseness of the report, may be thought doubtful, was altogether unnecessary to the decision of the case. We do not think that this is an authority (nor have we succeeded in finding any other), which, as it seems to us, would justify us in holding that such a liability can exist. In *Rex* v. *Ecclesfield* (2), it was held that where there are several townships in one parish, a particular township may by

(1) 12 Mod. 409. (2) 1 B. & A. 348.

1866

THE QUEEN v. ASHBY FOLVILLE.

immemorial usage be liable to repair its own roads as distinct from the parish at large. But this is obviously a very different thing from holding that a parish can be bound by prescription to repair roads not within its own ambit. In *Rex* v. *St. Giles, Cambridge* (1), it was not necessary to decide the point, as it was there held that, at all events, such a liability could not exist except on good and sufficient consideration, and in that case no consideration appeared. Now, it being the general law that each parish shall maintain its own highways, except where by reason of tenure some particular individual is bound to repair; and as it is certainly more consistent with general convenience that each parish shall maintain its own roads than that the repairs of the highways in one parish shall be done by the inhabitants of another; more especially as the machinery established by statute for insuring the repair of parish highways, and finding funds for that purpose would not be applicable to repairs to be done by a foreign parish; we are strongly disposed to think that in the absence of a direct decision on the point, we should not be warranted in holding that such a liability can possibly exist in point of law.

Upon further consideration, however, we think it unnecessary to decide the case on this ground. The case of *Rex* v. *St. Giles, Cambridge* (1) clearly establishes that a prescriptive liability could not arise except on sufficient consideration; and it appears to us that the consideration set forth in the defendants' plea is altogether insufficient to support the alleged liability of the parish of Gaddesby. The consideration is stated to be the levying and receiving by the latter parish of the rates and charges on and in respect of the lands in the parish of Ashby Folville adjacent to the said highway. But it is obvious that no such right can in law exist. The right to levy rates is the creature of statutory legislation. The rates can be levied and taken only by those to whom the statutory power is given. If the occupiers of this district were to refuse to pay the rates, it is plain that the parish of Gaddesby would have no power to compel payment. Neither would the parish of Ashby Folville be warranted in levying the rates with a view to handing them over to Gaddesby, inasmuch as the former parish would only be justified in making and levying

(1) 5 M. & S. 260.

highway rates in respect of such highways as it was bound to repair. We are of opinion, therefore, that the alleged consideration is illusory and bad, and that the liability of Gaddesby consequently fails.

Independently, however, of the objection arising on the insufficiency of the consideration, the nature of the consideration stated is of itself fatal to the case of the defendants. It is clear that if a parish can be liable to repair the roads in another parish, such liability must date beyond the time of legal memory. But the consideration must have been coeval with the liability, and must therefore also have existed from time immemorial. But here, the consideration being the right to levy rates and charges, inasmuch as the levying of highway rates arises from statutes passed long since the time of legal memory, it follows that the repair of this particular highway by the parish of Gaddesby must have been posterior to that time. And this, again, is fatal to the liability of Gaddesby as relied on by the defendants.

The proper conclusion therefore is, we think, that the repair of this highway by the parish of Gaddesby resulted from some arrangement come to between these parishes from considerations of mutual convenience, and which therefore could at any time be put an end to by either; and it appears by the record that notice was given to put an end to it on the part of Gaddesby.

We are therefore of opinion that the plea is on the face of it bad, and that on the demurrer to the replication there should have been judgment for the crown. The judgment of the quarter sessions must therefore be reversed.

*Judgment reversed.*

Attorneys for plaintiffs in error: *Loftus, Vizard, Crowder, & Anstie.*
Attorneys for defendants: *Hawkins, Bloxam, Paterson, & Power.*

1866
*Jan.* 24.

THE QUEEN, *on the prosecution of* THE OVERSEERS OF WEAVERHAM, RESPONDENTS, *v.* HEATH AND OTHERS, APPELLANTS.

*Highway—Exemption from Highway Rates since the Highway Act of* 1862 (25 & 26 *Vict. c* 61)—*Form of Poors-rate with Highway purposes.*

1 QBD 490

The township of W. separately maintains its own poor, and the hamlet of G. within the township, from time immemorial had separately maintained its own highways; H. was an occupier of land within the hamlet, the owners and occupiers of which from time immemorial had been exempt from contributing to the repairs of the highways by reason of their repairing a particular road in the hamlet; but the occupiers of the land had always been rated to the relief of the poor. The quarter sessions, under the 25 & 26 Vict. c. 61, divided the county into highway districts, and ordered, under s. 7, that "in case any township which separately maintains its own poor, is divided into any hamlets, &c., each of which separately maintains its own highways, such hamlets, &c., shall be combined, and such township shall be subject to the same liabilities in respect of all the highways within it which were before maintained by such hamlets, &c., as if all their several liabilities had attached to the whole township." The highway board for the division in which W. was situate, issued their precept, under s. 21, to the overseers, requiring them to pay to the treasurer a certain sum, by two instalments, towards the repairs, &c., of the highways within the township, including those in the hamlet of G., and the overseers made a rate, headed "an assessment for the relief of the poor of the township of W., and for other purposes chargeable thereon, at the rate of 1s. in the pound." This rate was made upon every occupier of property liable to be rated to the relief of the poor, including H.; the sum charged upon each being one sum, at the rate of 1s. in the pound. Of this the amount required for the payment of the first instalment under the precept was 4*d.* in the pound, and 8*d.* in the pound for the relief of the poor. H. having appealed against this rate on the ground, that, being exempt from highway rates, he ought to have been assessed at 8*d.* only:—

*Held*, that the effect of the 25 & 26 Vict. c. 61, coupled with the 5 & 6 Wm. 4, c. 50, s. 33, was not to alter the liability to highway maintenance; and that the rate ought to be amended by reducing the appellant's assessment to 8*d.* in the pound.

*Semble*, that the amount assessed for the highways should appear on the face of the rate; so that the ratepayers may see how much is for the maintenance of the poor and how much for the repair of the highways; and why one occupier, who is liable to both, is charged with the aggregate, and another, who is liable to one only, with that one.

ON an appeal against a poor-rate for the township of Weaverham, in the county of Chester, the quarter sessions confirmed the rate, subject to the following case:—

The township of Weaverham is one of several townships which

together constitute the parish of Weaverham. Weaverham township is a place separately maintaining its own poor, and for which two overseers are annually appointed under the 43 Eliz. c. 2, s. 1. The hamlet of Gorstage is situate within the township of Weaverham, but has from time immemorial maintained its own highways separately from the rest of the township, and a surveyor of highways was annually appointed for the hamlet until the date of the order of sessions hereinafter referred to. Gorstage was not a place separately maintaining its own poor, but has always been assessed to the poor-rate made for the township of Weaverham.

The appellant, Robert Heath, is the owner in fee of a mansion house, farms, and lands situate in the hamlet of Gorstage, called Hefferton Grange; the mansion-house, farms, and lands are now occupied by Robert Heath, and the other two appellants.

From time immemorial the owners and occupiers of Hefferton Grange have been liable to repair, and have repaired at their sole expense, a road or highway in the hamlet of Gorstage, leading from Acton Bridge to Tarporley, both in the county of Chester, and have, in consequence of such liability, been exempt from repairing or contributing to the repairs of the other highways in the hamlet of Gorstage. The occupiers of Hefferton Grange have always been rated in respect of the same to the relief of the poor of the township.

An order of quarter sessions for the county of Chester was made on the 4th of March, 1863, under the 25 & 26 Vict. c. 61, which order confirmed a provisional order of the 5th of January, 1863, by which the parishes, townships, and places mentioned in several schedules were formed into highway districts, the township of Weaverham being in the West Eddisbury district, and it was ordered (under s. 7) "That in case any township mentioned in any of the schedules, which separately maintains its own poor, is divided into any tithings, hamlets, or places, each of which separately maintains its own highways, such tithings, &c., shall be combined, and no separate waywarden shall be elected for such tithings, &c.; and such township shall be subject to the same liabilities in respect of all the highways within it which were before maintained by such tithings, &c., separately, as if all their several liabilities had attached to the whole township, and one waywarden shall be elected for such township as a whole."

1866

THE QUEEN v. HEATH.

Since the making of this order of sessions no surveyor of highways has been appointed, nor any separate highway rate been made for Gorstage; but the highways therein which were formerly repaired by that hamlet have been repaired by the highway board, at the expense or on account of the township of Weaverham.

For the purpose of obtaining the sum necessary to repair the roads in the township of Weaverham, including the highways in the hamlet of Gorstage, the West Eddisbury highway board, on the 13th of April, 1864, directed its precept to the overseers of the township of Weaverham under section 21 of the 25 & 26 Vict. c. 61, requiring the overseers to pay to the treasurer of the board the sum of 300*l.* by two equal instalments of 150*l.*, on the 30th of April, and the 29th of October, from the poor-rates of the township, towards the repair of the highways in the township and the contribution of the township to the common fund of the said highway division.

To enable the overseers of Weaverham to pay the first instalment of the above 300*l.* to the treasurer of the board, and to raise the sum necessary for poor law purposes in the half-year ending the 29th of September, 1864, the overseers made the rate appealed against. It is a rate made upon every occupier of property liable to be rated to the relief of the poor in the whole township of Weaverham. The rate assessed upon each occupier is 1*s.* in the pound; of this sum 4*d.* in the pound or thereabouts is the sum necessary to be raised for the payment of the 150*l.*, being the first instalment required to be paid by the above precept for the repairs of the highways, and 8*d.* in the pound or thereabouts is the sum necessary to be raised for the relief of the poor of Weaverham. Each of the appellants is rated to one entire sum, at the rate of 1*s.* in the pound.

The heading of the rate is "Poor-rate allowed 29th April, 1864. An assessment for the relief of the poor of the township of Weaverham, and for other purposes chargeable thereon according to law, made the 28th of April, A.D. 1864, at the rate of 1*s.* in the pound."

Against this rate the appellants appealed, the grounds of appeal being in substance, that the appellants were overrated, being

exempt from contributing to the repairs of the highways by reason of their liability to repair the above-mentioned road.

The appellants contend that they are by this rate assessed in too high a sum, and that no portion of the sum of 300*l.*, payable under the precept of the highway board, should be levied upon them, as they are exempt from contributing to the repair of the highways in Gorstage, whether that hamlet be separated from, or amalgamated with, the rest of the township of Weaverham; and that they ought only to be assessed at 8*d.* in the pound or thereabouts, being the sum necessary to raise the money required for the relief of the poor.

If the Court should be of opinion that the appellants ought not to be assessed in respect of the sum payable under the precept of the highway board, the sum assessed upon them was to be at the rate of 8*d.* in the pound or thereabouts, and the rate was to be amended and reduced accordingly; otherwise it was to stand confirmed.

Nov. 18. *Mellish, Q.C.*, and *M'Intyre*, for the respondents, in support of the order of sessions. By the 25 & 26 Vict. c. 61 s. 3 "parish" is to include any place separately maintaining its own highways; but by the last clause of section 7 the quarter sessions are expressly authorized in cases like the present to make the order they did, and when such an order has been made, all the provisions in the act relating to parishes within the meaning of the act, are to be applicable to the parish formed by the combination of the different hamlets. By section 21 (1) the overseers, in obedience to the precept of the highway board, are to pay the sum mentioned out of moneys in their hands applicable to the relief of the poor; and the proviso at the end applies to cases in which certain property is assessable to the highway rates and not to the poor-rate (see 5 & 6 Wm. 4, c. 50, s. 27); but the converse is not provided for. Section 22 (1) again applies when the highway parish is not conterminous with a poor-law parish, and in such cases a highway rate is to be made. In the present case section 23 applies, and subject to the restrictions in section 21 as to amount, the rates to meet the precept of the board are to be like ordinary rates for the relief of the poor.

(1) Sections 21 and 22 are set out at length in the judgment.

1866

THE QUEEN v. HEATH.

[LUSH, J. By section 20 each parish in a district is to pay the expenses of keeping its own highways in repair; and the proportion that this parish or township has to pay is less by reason of the appellants' liability to keep their road in repair.]

But the area being now increased over which the rate extends the proportion is varied. No doubt section 33 of the 5 & 6 Wm. 4, c. 50, will be relied on as preserving all existing exemptions from highway rates; but the answer to that is, the highway rate and poor-rate in such a case as the present are made one, and the poor-rate must be an equal pound rate on all property liable. To exempt the present appellants would be to destroy this equality; the exemption is, therefore, by necessary implication abolished. Sections 34 and 35 are the only sections applying to the obligation to repair *ratione tenuræ;* under the latter section all hardship upon the appellants can be obviated, if the justices choose to relieve them on paying a nominal sum.

*S. Temple, Q.C.*, and *Heath* for the appellants. Where land is *primâ facie* liable to be rated, but the occupier claims exemption, the proper mode of proceeding is by appeal: *Reg.* v. *Brown* (1); *Blechingdon* v. *Dand.* (2) The immemorial exemption and correlative liability of the appellants are admitted to have existed at the passing of the 25 & 26 Vict. c. 61, and there is nothing in that act which takes away any existing exemptions, and they can only be taken away by express words: *Rex.* v. *Pugh*(3), *Williams* v. *Pritchard* (4). Moreover, by sections 4 and 42 of the new act the old highway act, 5 & 6 Wm. 4, c. 50, is to be considered the principal act, and the two are to be read together. Now, although section 27 of the old act directs generally that all property liable, to be rated to the relief of the poor shall be rated to the highway rate, yet section 33 expressly preserves all exemptions from liability to highway rate. It is clear the new act contemplated that there would be a distinct estimate in respect of the highway purposes, though not a distinct rate, otherwise the limits in section 21 might be exceeded; and by reducing the appellants' assessment to 8*d.* the rate would not be unequal as to the poor-rate purposes, all would be rated in the same proportion to the poor-rate, viz., 8*d.* in the pound.

(1) 13 Q. B. 654.
(2) 3 New Sess. Cas. 640.
(3) 1 Dougl. 188.
(4) 4 T. R. 2.

[LUSH, J. Would it appear on the rate how much was for the relief of the poor and how much for highway purposes? The rate is "An assessment to the relief of the poor, and for other purposes chargeable thereon, at the rate of 1*s.* in the pound."]

Whether the two assessments appear on the rate or not, the estimate must be made as to how much of the rate is for each purpose; and both before and since the highway act of 1862, in making poor-rates the overseers have to regard special circumstances affecting particular ratepayers, and to assess and charge them in a different amount to the rest. As for instance, in parishes where the Small Tenements Act, 13 & 14 Vict. c. 99, is adopted. The two valuations must be made and kept for different purposes: see *Overseers of Sunderland* v. *Sunderland Union.* (1) Exemptions in whole or in part from poor and other rates based on the poor-rate are recognised and saved by the Union Assessment Committee Act, 25 & 26 Vict. c. 103 s. 36, passed in the same session, but after the Highway Act of 1862. The proviso in section 21 is strong to shew that no difference as to rateability was intended to be introduced; for if there had been property rateable to the highways and not to the poor-rate in this township, a highway rate must have been made in the same way as if the act had not passed; and then it is clear that in such a rate the appellants would have been exempt. Their right to exemption cannot depend on the collateral fact of whether there is or is not property of the kind mentioned in section 27 of 5 & 6 Wm. 4 c. 50. The form of the order of quarter sessions following the words of section 7 bears out this construction, for it expressly says that the whole township shall be subject to *the same* liabilities as to all the highways within it, *which were before maintained by the hamlets,* as if all their separate liabilities had attached to the whole township.

[SHEE, J. The liability is only to be continued in the same way, and so far as the hamlets were liable before.

MELLOR, J. The legislature seems to have dealt with this very subject in section 35; and yet there is no reservation of the exemption from general highway rates, but only means of getting rid of the liability to repair a particular road.]

(1) 34 L. J. (M. C.) 121; 18 C. B. (N. S.) 531.

1866

THE QUEEN v. HEATH.

Section 33 in the old act, which must be read with the new act, already provided for that. Section 35 of the new act is merely a re-enactment of section 62 of the old act, with the necessary alterations. On the whole the intention and effect of the Highway Act, of 1862, are obvious, viz., not to alter the liability of parishes or individuals with regard to the repair of the highways, nor to make the repairs an actual charge on the poor rate, but only to extend the area of management, &c.

*Cur. adv. vult.*

January 24. The judgment of the Court (Mellor, Shee, and Lush, JJ.,) was delivered by

LUSH, J. (After stating the facts of the case, and observing that by virtue of the order of quarter sessions, the hamlet of Gorstage became, for highway purposes, merged in the township, and the poor law parish and the highway parish thus became conterminous.)

It was contended by the appellants, that inasmuch as they were, before the order of sessions, exempted from highway rates in the hamlet, they are equally exempted from contributing by means of the poor-rate to the sum required for highway purposes. On the other hand it was urged by the respondents, that as the maintenance of the highways in the hamlet is transferred from the hamlet and charged upon the poor-rate of the township, which is, and must be, raised by an equal pound-rate upon all the assessable property in the parish, the exemption which the lands in question before enjoyed, is by necessary implication abolished.

Until the passing of the 25 & 26 Vic., c. 61, the fund for maintaining the highways had been raised by the highway rate upon the parish, township, or hamlet, liable thereto. And by the 33rd section of the Highway Act (5 & 6 Wm. 4, c. 50), it was enacted that "when property, or the owner in respect thereof, has, previous to the passing of this act, been legally exempted from the performance of statute duty, or from the payment of any composition in lieu thereof, or of any highway rate, the said property, and the owners or occupiers thereof, shall be exempt from the payment of the rate hereby imposed." That act is still in force, and by the 42nd section of the recent act it is to be con-

strued as one with the later act, so far as the provisions of the one are consistent with those of the other. Is there then anything in the recent act inconsistent with the provision here made for continuing the exemption to which the property had before been entitled? The 21st section enacts, that "For the purpose of obtaining payment from the several parishes within their district, of the sums due from them, the highway board shall order precepts to be issued to the overseers of the said parishes, stating the sum to be contributed by each parish, and requiring the overseers of each parish, within a time to be limited by the precept, to pay the sum therein mentioned to the treasurer of the board; and the overseers shall comply with the requisition of such precept by paying the sums to be contributed by their respective parishes, out of any moneys in their hands applicable to the relief of the poor; but no contribution required to be paid by any parish at any one time in pursuance of this act, shall exceed the sum of 10*d.* in the pound; and the aggregate of the contributions required to be paid by any parish, in any one year, in pursuance of this act, shall not exceed the sum of 2*s.* 6*d.* in the pound, except with the consent of four-fifths of the rate-payers of the parish in which such excess may be levied, present at a meeting specially called for the purpose, of which ten days previous notice has been given by the waywardens of the parish; and then only to such extent as may be determined by such meeting. Provided that in any parish where for a period not less than seven years immediately preceding the passing of this act, it has been the custom for the surveyor of highways for such parish, to levy a highway-rate in respect of property not subject by law to be assessed to poor-rates, the moneys payable in pursuance of the precept of the highway board shall not be paid by the overseers, but may be raised and paid by the waywarden of such parish out of a highway rate, to be assessed and levied in manner and in respect of the property in and in respect of which the same would have been assessed and levied if this act had not passed."

It appears clear to us that the object of the legislature in passing this act was not to alter the liability to highway maintenance, but only to extend the area of management, to equalize the costs of

1866

THE QUEEN v. HEATH.

repair, and to simplify the machinery for providing the necessary funds; and it is plain that if there had been in this township lands liable to contribution to the highways, but not to the poor rate, the lands in question would, by virtue of the 33rd section above quoted, be exempted as they were before. If, therefore, these lands are now chargeable, it must be as a necessary consequence, not intended by the legislature, of their having in cases like the present substituted the poor-rate for the highway-rate, as the fund out of which the supplies for maintaining the roads are to come. But we are of opinion that no such consequence follows. So much of the rate imposed for both purposes as is raised for the support of the poor must, no doubt, be an equal pound rate upon all the occupiers of property liable to be assessed for that purpose; but that being so, the rate cannot be objected to, because so much of it as is raised for the highways is imposed upon only part of the property, the residue not being liable to that charge. The amount assessed for the highways should appear on the face of the rate, so that the rate-payers may see how much is for the maintenance of the poor, and how much for highways, and why one occupier who is liable to both is charged with the aggregate, and another who is liable to one only, with that one. There is no inequality in this, for every occupier is equally charged with the burthen which belongs to him. This mode of working out the requirements of the act appears to us sanctioned, if not required, by the 22nd section. That section enacts, that "Where any parish, as defined by this act, and in this section called a highway parish, is not a parish separately maintaining its own poor, in this section called a poor-law parish, the highway board shall issue their precept or precepts to the overseers of the poor-law parish, or of the several poor-law parishes, if more than one, of which such highways parish forms part, and in the precept or precepts so issued shall specify the part or parts of the poor-law parish or poor-law parishes constituting the highway parish in which the sum required by the board is to be levied, and if there be more than one such parish shall apportion among such parts the amounts to be levied in such parish." Where in the cases contemplated by this section the overseers require to raise money for the maintenance of the poor as well as for the highways, they must, in order to comply

1866

THE QUEEN v. HEATH.

with the statute, adopt the course contended for by the appellants. For these reasons we are of opinion that the order of sessions confirming the rate should be quashed, and the rate amended by reducing the assessment upon the appellant to 8*d.* in the pound.

*Order of sessions quashed, and rate to be amended.*

Attorneys for appellants: *Hayes, Twisden, Parker, & Co.*
Attorneys for respondents: *C. & C. R. Cuff.*

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THE QUEEN, *on the prosecution of* THE GUARDIANS OF THE HAYFIELD UNION, APPELLANTS, *v.* THE GUARDIANS OF THE GLOSSOP UNION, RESPONDENTS.

*Jan.* 24.

*Poor—Irremoveability—Break of residence.*

A single woman, aged 32, in January, 1861, had resided in the township of G. for more than three years; she was then residing with her widowed mother, and continued with her until the month of September, when she went to live out of G. as a domestic servant, on the terms of remaining a month upon trial, and if she remained longer, on the usual terms of a month's warning; at the time she left she intended to return to her mother's house if she received notice to leave within the month; her mistress gave her notice, and she returned to her mother's house in G. at the end of the month, where she remained till February, 1864:—

*Held*, that she had not become irremoveable from G., as her absence for a month was a break of residence, her intention to return being immaterial as she had no residence of her own to return to.

UPON an appeal to the Derbyshire Quarter Sessions by the guardians of the Hayfield union against an order of justices of the 26th November, 1864, adjudging that the township of Hayfield, in the said union, was the place of settlement of Elizabeth Gantcliffe, a pauper lunatic, and ordering the said guardians to pay to the guardians of the Glossop union, the costs of removal, maintenance, &c., the sessions quashed the order subject to the following case:—

The pauper is a single woman, 32 years of age; and for the purpose of this case, is to be taken to be legally settled in the township of Hayfield, in the Hayfield union. Her father died eight years ago, and since that time she has occasionlly been out to service as a domestic servant, residing, when not in service,

1866

THE QUEEN v. GLOSSOP.

sometimes with her mother, and sometimes with her brother, both of whom have for some years lived in the township of Glossop, in the Glossop union. In January, 1861, the pauper had resided within the township of Glossop, for three years preceding and upwards, and was then residing with her mother in the township of Glossop, and continued to do so until the month of September, when she went to live out of the township of Glossop with a Mrs. Arnold in Tintwistle, in the union of Ashton-under-Lyne, as a domestic servant. Her arrangement with Mrs. Arnold was, that she should serve her for a month upon trial, and at the end of that time, if both parties agreed, she should continue in Mrs. Arnold's service as a domestic servant upon the usual terms of quitting, at the expiration of a month's notice, to be given by either of them to the other. The pauper accordingly went to Tintwistle, and entered into Mrs. Arnold's service, taking with her some clothes in a bundle. She had no other clothes or property.

When the pauper went into Mrs. Arnold's service, and during the whole time of her service, she intended to return to her mother's house at Glossop, in the event of her receiving notice to leave the service within the month.

When she had been there a fortnight Mrs. Arnold told her she would not suit, and that she must leave at the end of the month, which the pauper accordingly did, and returned to her mother at Glossop, with whom she continued to reside until the 25th of February, 1864, when she was removed to the Derbyshire County Lunatic Asylum, under a magistrate's order, dated the day previous.

The quarter sessions held that the above circumstances did not constitute a break in the pauper's residence in the township of Glossop.

The question for the Court was, whether at the time of her being conveyed to the asylum, the pauper would have been exempt from removal to the parish of her settlement by reason of any provision in the 9 & 10 Vict. c. 66, and 24 & 25 Vict. c. 55.

*S. B. Bristowe* and *Fitzjames Stephen*, for the appellants. The pauper was not removeable. The cases of *Reg.* v. *Stapleton* (1),

(1) 1 E. & B. 766; 22 L. J. (M. C.) 102.

1866

THE QUEEN v. GLOSSOP.

*Reg.* v *Brighton* (1), *Reg.* v. *Tacolnestone* (2), shew, that where there is a temporary absence with an intention to return, there is no break of residence. Here the pauper's residence was at her mother's house, and she had an intention of returning there, if she did not suit her employer.

[BLACKBURN, J. She had no fixed home at Glossop, and when she was bodily absent at Tintwistle, how can you say she had a constructive residence at Glossop?

MELLOR, J. There must be either an actual residence or constructive residence by having a residence to return to; in the present case the pauper had neither.]

*Reg.* v. *Stourbridge* (3) is distinguishable. There the pauper had given up his lodgings, and had no residence to return to; here the pauper could return to her mother's house, which was her residence. In *Reg.* v. *St. Leonard, Shoreditch* (4), Cockburn, C.J. seems to treat the fact of whether or not a person has a residence of his own to return to as immaterial.

[BLACKBURN, J. The decision in that case proceeded on the ground that the pauper was really never out of the parish.]

*Hayes, Serjt.*, and *Cave*, contrà, were not called upon.

BLACKBURN, J. The cases on this subject turn on their particular circumstances; but the result of them is, that where a person goes away from a parish for a temporary purpose, leaving a house or lodging behind him, he is still in effect residing in the parish. On the other hand, if he goes away, even leaving wife and children behind him, and establishes himself elsewhere, there is no residence. (5) There must be both a place which he has a right to return to and an intention to return, to constitute a constructive residence; and where a man has gone away and left no residence, though he means to return at a future time, the animus revertendi is immaterial. In the present case there might have been an intention to return, but the pauper left no place of her own to which she could return. The pauper was therefore not

(1) 4 E. & B. 236. 24 L. J. (M. C.) 41.

(2) 18 L. J. (M. C.) 44. 12 Q. B. 157.

(3) 34 L. J. (M. C.) 179.

(4) Ante p. 21.

(5) See *Wellington v. Whitchurch*, 4 B. & S. 100; 32 L. J. (M. C.) 189.

1866

THE QUEEN v. GLOSSOP.

irremoveable; and the order of sessions was wrong, and the order of justices right.

MELLOR and LUSH, JJ., concurred.

*Order of sessions quashed; order of justices affirmed.*

Attorneys for appellants: *Gregory & Rowcliffes.*
Attorneys for respondents: *R. & W. B. Smith.*

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*Jan.* 30.

## THE QUEEN *v.* RAND AND OTHERS.

*Justice of the Peace—Disqualifying interest—Possibility of bias.*

Though any pecuniary interest, however small, in the subject-matter disqualifies a justice from acting in a judicial inquiry, the mere possibility of bias in favour of one of the parties does not *ipso facto* avoid the justice's decision; in order to have that effect the bias must be shewn at least to be real.

The corporation of B were the owners of waterworks, and were empowered by statute to take the water of certain streams, without permission of the mill-owners, on obtaining a certificate of justices that a certain reservoir was completed, of a given capacity, and filled with water. An application was made to justices accordingly, which was opposed by the mill-owners; but after due inquiry the justices granted the certificate. Two of the justices were trustees of a hospital and friendly society respectively, each of which had lent money to the corporation on bonds charging the corporate fund. Neither of the justices could by any possibility have any pecuniary interest in these bonds; but the security of their *cestui qui trusts* would be improved by anything improving the borough fund, and the granting of the certificate would indirectly produce that effect, as increasing the value of the waterworks. There was no ground to doubt that the justices had acted *bonâ fide*:—

*Held*, that the justices were not disqualified from acting in the granting of the certificate; and the Court refused a *certiorari* for the purpose of quashing it.

THIS was a rule calling on John Rand and four others, justices of the West Riding of Yorkshire, and the corporation of Bradford, to shew cause why a writ of *certiorari* should not issue to bring up a certificate of the justices dated 18th April, 1865, certifying that a certain reservoir, by the Bradford Waterworks Act, 1854, authorized to be constructed near Doe Park, had been completed and filled with water, and was capable of containing one hundred and ten millions of gallons of water, for the purpose of quashing it, on the ground that the justices, or some of them, were interested in the subject-matter.

The facts disclosed on the affidavits are sufficiently stated in the judgment.

*Mellish, Q.C.* and *Kemplay* (in Trinity Term, 1865, June 15th,) shewed cause.

[*Cleasby Q.C.* contrà, intimated that he admitted that s. 46, of 17 & 18 Vict., c. cxxix., cured all objections in point of interest in the justices as ratepayers of the borough, but that he should rely on the one objection that two of the justices were mortgagees of the borough fund, and that the security of the mortgagees would be improved by anything which tended to improve the corporation property, and that the granting the certificate would greatly increase the value of the waterworks.]

The justices are only interested as bare trustees, and conceding that the certificate may have the effect suggested, such an interest will not, *ipso facto*, disqualify them, as any direct pecuniary interest might: *Reg.* v. *Dean of Rochester* (1); *Ex parte Pettinmangin.* (2)

*Cleasby, Q.C.*, and *Maule* in support of the rule. Any interest or probability of bias is sufficient to disqualify a justice acting in a judicial inquiry: *Reg.* v. *Hertfordshire Justices.* (3) It is impossible to say what influence their position as trustees may have had upon the justices, without imputing to them any intention of acting otherwise than with strict impartiality.

*Cur. adv. vult.*

Jan. 30. The judgment of the Court (Cockburn, C.J., Blackburn, and Shee, JJ.) was delivered by

BLACKBURN, J. In this case, by the Bradford Waterworks Act, 1854 (17 & 18 Vict. c. cxxiv. s. 51), the waterworks company were empowered to take the water of certain streams, but it was enacted that they should not take those flowing into the Harden Beck without the assent of the millowners on that beck, until it had been certified by justices that a reservoir, called Doe Park Reservoir, had been completed and filled with water, and of a given capacity; the company being required to give ten days' notice to

(1) 17 Q. B. 1; 20 L. J. (Q.B.) 467.
(2) Cited in *Reg. v. Allan*, 4 B. & S. at p. 921; 33 L. J. (M. C.) at p. 99.
(3) 6 Q. B. 753.

1866

THE QUEEN v. RAND.

the millowners before applying for the certificate, to the intent that they might oppose the granting of it. By an act of the same session (17 & 18 Vict. c. cxxix. s. 12), the municipal corporation of Bradford were empowered to purchase the Bradford waterworks for the benefit of the borough, and they did so. Afterwards (in January, 1865) the municipal corporation duly gave notice of their intention to apply for the certificate of justices; it was opposed, but the justices, after hearing evidence and making an elaborate inquiry, decided in favour of the corporation, and granted their certificate. A rule was obtained for a *certiorari* to bring up this certificate to be quashed, on the ground that the justices who granted it were interested. All the objections were disposed of during the argument except the following. On the affidavits on both sides it appeared that a hospital and a friendly society had invested part of their funds in bonds of the Bradford corporation, charging the borough fund (1), and that these bonds were taken in the names of trustees, and that two of the justices in question were, one of them amongst the trustees of the society, and the other amongst the trustees of the hospital. Neither of them had, nor by any possibility could have, any pecuniary beneficial interest in these bonds, but no doubt the security of their *cestui qui trusts* would be improved by anything improving the borough fund, and anything improving the waterworks, after they became the property of the corporation, would produce that effect.

The question which we have to determine, was whether this disqualifies the justices from acting in what was certainly a judicial inquiry: and we think it does not. There is no doubt that any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter; and if by any possibility these gentlemen, though mere trustees, could have been liable to costs, or to other pecuniary loss or gain, in consequence of their being so, we should think the question different from what it is: for that might be held an interest. But the only way in which the facts could affect their impartiality, would be that they might have a tendency to favour those for whom they were trustees; and that is an objection not in the nature of interest, but of a challenge to the favour. Where-

(1) See the 17 & 18 Vict. c. cxxix. s. 8, and 18 & 19 Vict. c. clii. ss. 2 & 4.

1866

THE QUEEN v. RAND.

ever there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong in him to act; and we are not to be understood to say, that where there is a real bias of this sort this Court would not interfere; but in the present case there is no ground for doubting that the justices acted perfectly *bonâ fide*; and the only question is, whether in strict law, under such circumstances, the certificate of such justices is void, as it would be if they had a pecuniary interest; and we think that *Reg.* v. *Dean of Rochester* (1) is an authority, that circumstances, from which a suspicion of favour may arise, do not produce the same effect as a pecuniary interest. And as the decision in that case was on demurrer to a plea, and might have been taken into error, the authority is one on which we ought to act.

We think, therefore, that the rule should be discharged.

*Rule discharged.*

Attorneys for prosecution: *Bell, Brodrick, & Bell.*

Attorneys for defendants: *Torr & Co.*

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WHITCHURCH, APPELLANT; THE BOARD OF WORKS FOR THE FULHAM DISTRICT, RESPONDENTS.

Jan. 20.

*Metropolis Management Acts*, 18 & 19 *Vict.* c. 120, s. 105; 25 & 26 *Vict.* c. 102, ss. 77, 112—*Paving of New Street—Apportionment of Expenses.*

A board of works, under the Metropolitan Management Acts, passed a resolution that a certain road should be repaired, and instructed the surveyor to estimate the cost and apportion it on the owners of property through which the road passed. The surveyor divided the road into four sections, and apportioned the cost of repairing each section amongst the owners of property in each section respectively. These apportionments were confirmed by resolutions of the board:—

*Held*, that although the board might, under s. 105 of 18 & 19 Vict. c. 120, and ss. 77 & 112 of 25 & 26 Vict. c. 102, have resolved that part of the road should be repaired, yet, as they had resolved that the whole road should be repaired, there ought to have been but one apportionment on all the owners along the entire road; and that the separate apportionments were invalid, and could not be enforced.

CASE stated under 20 & 21 Vict. c. 43, by one of the magistrates of the Hammersmith police court.

A complaint was preferred by the respondents against the

(1) 17 Q. B. 1; 20 L. J. (Q.B.) 467.

1866

WHITCHURCH v. FULHAM BOARD OF WORKS.

appellant, that he, being the owner of certain houses or building land, in or abutting upon Latymer Road, Hammersmith, a new street about to be paved by the respondents, unlawfully neglected to pay to them 97*l.* 16*s.*, his share of the estimated expenses.

1. At the hearing it was proved on the part of the respondents, and admitted that under the Metropolitan Management Act, 1855 (18 & 19 Vict. c. 120), the Fulham district is composed of the parish of St. Peter and St. Paul, Hammersmith, and that the respondents have been and are duly constituted, under the Metropolis Management Acts, the Board of Works for the Fulham district.

2. By the 105th section of the 18 & 19 Vict. c. 120, it is enacted, "That in case the owners of the houses, forming the greater part of any new street, laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate, be desirous of having the same paved as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then, and in either of such cases, such vestry or board shall well and sufficiently pave the same, either throughout the whole breadth of the carriage-way and footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair; and the owners of the houses forming such street shall on demand pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement (such amount to be determined by the surveyor for the time being of the vestry or board): and in case such estimated expenses exceed the actual expenses of such paving, then the difference between such estimated expenses and such actual expenses shall be repaid by the said vestry or board to the owners of houses by whom the said sum of money has been paid; and in case the said estimated expenses be less than the actual expenses of such paving, then the owners of the said houses shall on demand pay to the said vestry or board such further sum of money as, together with the sum already paid, amounts to such actual expenses."

3. By the 77th section of the Metropolitan Management

Amendment Act, 1862 (25 & 26 Vict. c. 102), it is enacted, "That when any vestry or district board shall, under the powers given by the 105th section of the Metropolitan Management Act, 1855, have paved, or be about to pave, any new street, the owners of the land bounding or abutting on such street, shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses therein. Provided, that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do; and any such costs or expenses, including the costs of paving at the points of intersection of streets, and all other incidental costs and charges, shall be apportioned by the vestry or district board, and shall be recoverable either before the work shall be commenced, or during its progress, or after its completion; and it shall be lawful for the vestry or district board, at their discretion, to accept payment of the amount apportioned or charged in respect of each house or premises by instalments, spread over a period of not exceeding twenty years; and any such amount shall be recoverable from the present or any future owner of the premises, either by action at law or in a summary manner, before a justice of the peace, at the option of the vestry or board."

4. By the 110th section of the last act it is enacted, "That the said recited acts (including the Metropolis Management Act, 1855) and this act, shall be construed together as one act."

5. At a special meeting of the respondents, held on the 25th March, 1863, it was resolved, "That the roads in the parish of Hammersmith, known as St. George's Road, Clifton Street Road, and Latymer Road, be repaired under the 77th section of 25 & 26 Vict. c. 102. That the surveyor be, and is hereby instructed to estimate the cost of such repairs of the same, and apportion it on the owners of each of the properties through which the roads go, and that it be referred to the general purposes committee to carry out this resolution, under the advice of the solicitor, upon the condition that such costs be obtained from the owners of each property before the respective works are begun. But the committee is hereby empowered to repair either

1866

WHITCHURCH v. FULHAM BOARD OF WORKS.

of such roads, so soon as the estimated cost thereof shall have been received from the owner or owners."

6. Pursuant to this resolution, Mr. Bean, the surveyor to the respondents, made an estimate of the cost of such repairs of the whole of the St. George's Road, Clifton Street Road, and Latymer Road, and also an apportionment of the same on the property to be charged therewith, together with apportionments on the owners of property. This estimate and apportionment was submitted to the general purposes committee of the respondents' board, on the 1st April, 1863, and the committee resolved thereon, "That application be made to the owners for their proportion of the costs of repairing St. George's Road, pursuant to the surveyor's apportionment. And under the advice of the solicitor, payment to be made within one calendar month from the date of service of notice. That application be made to the owners for the proportion of the cost of repairing Clifton Street Road, pursuant to surveyor's apportionment; and under the advice of the solicitor, payment to be made within one calendar month from the date of service of notice."

7. The notices referred to in such resolution were served, the money was obtained, and the St. George's Road and Clifton Street Road were then repaired by the respondents.

8. On the 13th October, 1863, a meeting of the general purposes committee of the respondents' board was held, when it was resolved as follows, namely, "That the board be recommended to have notice served on the owners of Latymer Road forthwith."

9. Latymer Road lies between a piece of land belonging to the Latymer Charity at one end, and Wormholt Scrubs at the other; and for the purposes of this case may be considered as divided into four sections, hereinafter referred to as sections 1, 2, 3, and 4, respectively. Section 1 consists of that part of the road which lies between Clifton Street and the south side of the railway. Section 2 consists of that part of the road which lies between the railway and a public-house called the Latymer Arms. And the remaining portion of Latymer Road, namely, section 3, consists of that part of the road which lies between the Charity land and the point of junction by Clifton Street; and section 4 consists of that

part of the road which lies between the Latymer Arms and Wormholt Scrubs.

10. Shortly after the passing of the last mentioned resolution, Mr. Bean, the respondents' surveyor, made an apportionment of the costs of repairing a portion of the road, which portion was called section 1, amongst the owners of the property constituting such portion, such apportionment varying in some cases only in detail according to correction of owners' names, but not increasing the assessment.

11. At a meeting of the respondents held on the 30th December, 1863, the surveyor's apportionment for the cost of paving on the owners of that portion of Latymer Road, south of the railway bridge, was presented, when the resolution was passed, "That such apportionment be adopted, and that notices in conformity therewith be served on the owners to pay the several amounts so apportioned."

12. This resolution was also acted upon, and the repairs were completed.

13. Mr. Bean, the surveyor, then apportioned the cost of repairing another portion (called section 2) of the Latymer Road amongst the owners of property comprised in such portion.

14. At a meeting of the respondents held on the 23rd March, 1864, the surveyor attended with his apportionment of the cost of repairing such portion (called section 2) of the Latymer Road, when it was resolved, "That the said apportionment be adopted, and that the clerk be, and is hereby instructed, to serve notices on the owners to pay their portion of the costs of paving such road pursuant to such apportionment."

15. Pursuant to this resolution, the clerk of the respondents caused notices to be served accordingly. The appellant is one of such owners, and the following is a copy of the notice which was served upon him.

"Metropolis Local Management Act.

To Mr. James Whitchurch, Lancaster Road, Kensington, owner of a plot of building land, situate southward of the Britannia Public-house on the west side of Latymer Road, Hammersmith, and numbered 73 on the plan sent in.

1866

WHITCHURCH v. FULHAM BOARD OF WORKS.

Whereas the street or way known as Latymer Road, Hammersmith, in the county of Middlesex, is not paved to the satisfaction of the Board of Works for the Fulham district, and it appearing to the said board that the said street should be so paved, I hereby give you notice that the said board hereby require you as such owner as aforesaid, to pay, within twenty-eight days from the date of the service of this notice, to me at the office (called Broadway House) of the said board, situate at, &c., the sum of 97*l.* 16*s.*, being the amount of the estimated cost of and incident to such paving payable by you as such owner. And take further notice, that if the said sum be not paid as aforesaid, proceedings will be taken for recovery thereof. Dated this 2nd day of April, 1864.

Yours, &c., W. Lovely,
Clerk to the said Board."

The appellant neglected to pay the sum demanded of him by the notice, or any part of it.

17. It was contended before the magistrate, on behalf of the appellant, that he was not bound to pay the amount apportioned upon him, and for which he had been summoned, inasmuch as the resolution of the board of the 25th March, 1863, authorized the repairing of the three roads therein mentioned, or either of them, as entire roads, and not in sections, and therefore that the expenses of paving the whole of the Latymer Road should have been estimated by the respondents' surveyor at one time, and in one sum, and apportioned by one apportionment on all the owners of the lands abutting on the road, and such apportionments should have been adopted by the board, whereas the surveyor had apportioned the respective amounts of his estimates by different apportionments, and upon the owners of property comprised respectively in separate sections of the road, for which respectively the estimate was made, and which partial apportionments were adopted by the board.

18. It was contended on the part of the respondents, that as they had by their resolution of the 25th March, 1863, determined on repairing the roads or either of them therein mentioned, and the Metropolis Management Act had not prescribed any mode in

which the estimate of the expenses of repairing roads, and the apportionment of such expenses are to be made, or any period within which such repairs are to be completed, the respondents (a committee for the general purposes, to whom the respondents had referred the carrying out of the repairs) had a general discretion vested in them to carry out the repairs as they considered best, and either in sections or otherwise, and to adopt the apportionment by their surveyor, either as a whole or separated, for the work determined to be done, and that the proceedings of the board were regular, and that payment against the appellant ought to be enforced.

The magistrate, being of opinion that the respondents were right, ordered the appellant to pay the sum charged upon him.

The question for the opinion of the Court was, whether it was necessary for the legal carrying out of the resolution of the respondents of the 25th March, 1863, to repair the Latymer Road, that *one* estimate *only* of the expenses of paving the whole of the said road should have been made by the respondents' surveyor, and that there should have been but *one* apportionment of those expenses amongst all the owners of property abutting on the whole of the said road, or whether the respondents under the said resolution were warranted in causing separate apportionments in respect of the paving of separate and distinct sections of the said road to be made from time to time.

*Keane, Q.C.* (*L. Kelly* with him), for the respondents. The only mode of enforcing payment of these expenses is before justices, under s. 225 of the 18 & 19 Vict. c. 120: *St. Pancras* v. *Batterbury*. (1) The two acts are to be read together (s. 110 of 25 & 26 Vict. c. 102). By s. 112 of the second act, "new street" is to include "all streets hereafter to be laid out, and *a part of any such street*." And taking sections 105 of the first act, and 77 of the second act, and interpreting street by s. 112, it is clear that the respondents had power to order this street called Latymer Road to be paved in sections. There is nothing in the acts requiring but one estimate and one apportionment of the expenses of paving the different parts of the street, nor is any formal resolution neces-

(1) 26 L. J. (C. P.) 243; 2 C. B. (N. S.) 477.

1866

WHITCHURCH v. FULHAM BOARD OF WORKS.

sary previous to making the estimate or apportionment of the expenses. Therefore, even if the resolution of 25th March, 1863, did not authorize the course pursued, the resolutions of 30th Dec., 1863, and 23rd March, 1864, adopting the proceedings of the committee, and the estimates of the surveyor, were valid. Moreover, it is not shewn that the result is different from what it would have been had the apportionment been made over the whole street at once. There is no appeal in these cases; s. 211 of the first act is the only appeal clause, and does not extend to a case like the present.

*Karslake, Q.C.* (*Haselfoot* with him), for the appellant, was not heard.

COCKBURN, C.J. The acts authorize the vestry, or district board, to make an order for the paving of a new street, and street includes part of a street; so that the board may make an order that a certain street shall be paved, or they may make an order that a certain part of a street shall be paved; but whatever order they make they must follow it out in their apportionment of the expenses, and apportion them among the owners of the whole of the property in and abutting upon the street or part of a street mentioned in the order; and they cannot, when they have made the order, afterwards divide the street into sections, and apportion the cost of each section on the property in each section. Such a proceeding might work very great injustice. In a street of great length there might be a great variety in the character and value of property in different parts of it. If you take the whole street together, the burthen would be equally distributed; but if you take a part only, and assess the property in that particular part to the costs of paving that part, the assessment would fall unequally, and the burthen be too heavy on the poorer parts; so instead of properly apportioning, you would be apportioning in a manner that would work a very great grievance. This apportionment was, therefore, bad, and the order of the magistrate was wrong, and must be quashed.

BLACKBURN, J. I am of the same opinion. The district board have to consider and determine, in the first instance, whether a given street shall be paved; if they had come to the conclusion

1866

WHITCHURCH v. FULHAM BOARD OF WORKS.

that the first section only of this road should be paved at this time, they might, in all probability, have made an order to that effect. But they have come to the conclusion that the whole of Latymer Road, as one street, should be paved; and the statutes provide, when the board order that a particular street shall be paved, they shall apportion the expense among the owners of property in the street. It is to be an equal rate on all property in proportion to its value, subject to this exception, that if the board think fit, land is to be assessed in a less proportion than house property. Now, what the respondents have done, in the present instance, is very analogous to the case of overseers of a parish, if, where the whole of the poor of the several hamlets are chargeable to the parish at large, they had divided the poor and apportioned the charge for the support of the poor of each hamlet on the inhabitants of that hamlet; it is just possible it might produce the same result, but inasmuch as they would not have followed out the act of Eliz., the rate would be void. So here, by apportioning the whole expense among the owners throughout the whole street, the result probably would be something different; at all events, it is sufficient to say that the board have not followed the authority conferred upon them by statute; the apportionment therefore was invalid, and the magistrate's order wrong.

*Order quashed.*

Attorney for appellant: *Vining.*
Attorney for respondents: *J. Bird.*

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THE QUEEN *on the prosecution of* THE PHŒNIX GAS LIGHT AND COKE COMPANY, APPELLANTS, *v.* THE INHABITANTS OF THE PARISH OF LEE, RESPONDENTS.

*Jan.* 17.

*Poor-rate—Rating of Gasworks—Deductions for Machinery, &c., fixed to the Freehold—Purchase by tenant of the machinery—*6 & 7 *Will.* 4, *c.* 96, *s.* 1.

On assessing gasworks to the poor-rate, in ascertaining the gross estimated rental a deduction ought to be allowed in respect of the cost of the *meters*, which belong to the gas company, but are put up on the premises of the consumers, and are connected with the service-pipes by solder, and by means of those pipes with the company's mains: as they are mere chattels.

But deductions ought not to be allowed in respect of—1. *Retorts*, which are instru-

1866

THE QUEEN v. LEE.

5 QB 135; 7 QB 332

ments in which the coals are carbonized and the gas produced, consisting of circular pieces of clay, to which the heat is applied, and also the arches which contain them, and the pipes through which the gas passes to the purifiers, the whole being distinct and severable from the floor, and not attached to it by cement or mortar, but only packed with fire-clay. 2. *Purifiers*, which are massive iron vessels, standing on a brick base, but not fixed to it, connected with the pipes passing through the soil to the retorts by screw-bolts, and in the same way with the pipes passing through the soil to the tanks and gasholders. 3. *Steam-engines*, used for driving the machinery, fastened by screw-bolts to a stone base fixed in the soil. 4. *Boilers*, set in brickwork, fixed in the soil. 5. *Gasholders*, which are hollow cylindrical vessels of plate-iron, covered at the top but open at the bottom, and rising and falling by means of pillars and pulleys into circular tanks sunk in the soil, into which the gas passes through the purifiers from the retorts. 6. *Trade-fixtures*, such as pumps and exhausters, which are fixed to the freehold, but would be removeable as tenant's fixtures. For all of these are things which, though capable of being removed, are yet so far attached as that it was intended that they should remain permanently connected with the freehold, viz., the gasworks, and remain permanent appendages to them, as essential for the purpose for which the works were made. And it makes no difference that, by the practice in letting gasworks, the tenant would be compelled to take to and find capital for the purchase of all the above property.

ON an appeal to the Quarter Sessions for the county of Kent by the Phœnix Gas Light and Coke Company, against a poor-rate of 2nd July, 1864, for the parish of Lee, in which the appellants were rated as occupiers in respect of their line of pipes throughout the parish, of the estimated extent of 15,230 yards, at a gross estimated rental of 1539*l.*, and a rateable value of 1213*l.*, the sessions amended the rate by reducing the gross estimated rental to 500*l.*, and the rateable value to 364*l.* subject to the opinion of the Court upon the following case:—

1. The appellants are a Gas Light and Coke Company, incorporated by 5 Geo. 4, c. lxxviii., amended by 27 & 28 Vict. c. clix., for the purpose of the manufacture of gas, and its supply to parts of the metropolis and its suburbs. The company possesses three stations or establishments for the manufacture of gas, in the parishes of St. Mary, Lambeth, St. Saviour, Southwark, and St. Alphage, Greenwich, respectively; and two for storage, in the parishes of St. Mary, Lambeth, and St. George the Martyr, Southwark, respectively, where the gas is distributed by mains and pipes to the various parishes and the consumers' houses.

2. The stations are fitted with all the apparatus necessary for the manufacture and storing of gas. This apparatus, hereinafter

more particularly described, and the buildings of the stations, have been from time to time placed by the company upon land purchased by them for the purpose, and of which they are absolute owners, with the exception that a small part of their offices at Bankside is rented by them from other persons.

3. The gas having been manufactured at the establishment above mentioned, is distributed to the various parishes through mains laid beneath the surface of the streets. From the mains it is distributed by service-pipes to the houses of the consumers, and to the public lamps.

4. The service-pipes lead to meters which are used for measuring the gas supplied to the consumers, and from the other side of which other pipes convey the measured gas to the burners.

5. The mains are the property of the company. The public lamps, and the service-pipes which supply them, are the property of the parishes. The service-pipes which supply private consumers are laid down by, and belong to, the company, for the first 25 feet from the main; but beyond the 25 feet, they are laid down and repaired at the expense of consumer. The meters are not in all cases at so great a distance as 25 feet from the mains. At or near the place where the service-pipe ends is placed a main tap, by which the gas can be turned off, and which belongs to the consumer. Neither the meters nor the pipes beyond the main taps are on the land of the company. No rent is charged for the use of the meters, but the consumers are charged for the gas consumed as measured by the meters, at a certain price per 1000 cubic feet.

6. The property of the company in Lee parish, exclusive of the meters, consists only of mains and service-pipes. In 1863, the assessment was raised to 1539*l.* gross and 1213*l.* net rateable value. Against this increased rating the company appealed, and produced the following statement, and gave evidence to establish the accuracy of the figures therein set forth.

7. The Phœnix Gas Company and Lee parish.

STATEMENT BY THE COMPANY.

1866

THE QUEEN v. LEE.

| | | | |
|---|---|---|---|
| GROSS RECEIPTS:— | | | £ |
| Total rental for gas light for the year ending December, 1863 .. | | | 143,689 |
| WORKING EXPENSES:— | | £ | |
| Coals, 78,563 tons at 15*s.* 3*d.* .. .. .. .. | | 59,888 | |
| Materials for purification .. .. .. .. .. | | 984 | |
| | | 60,872 | |
| Less residual products—viz., coke breeze, tar, and ammoniacal liquor .. .. .. .. .. .. | | 33,394 | |
| | | 27,478 | |
| WAGES:— | | | |
| Salaries and commissions .. .. .. .. .. | | 21,537 | |
| Office expenses and stationery .. .. .. .. | | 2,014 | |
| Maintenance of works, retorts, &c., including the expenses, not only of repairs, but also of reinstatement .. .. | | 20,576 | |
| Meter repairs and fixing .. .. .. .. .. | | 3,100 | |
| Lighting, cleansing, and repairing public lamps .. .. | | 2,981 | |
| Bad debts and overcharges .. .. .. .. .. | | 715 | |
| Law expenses .. .. .. .. .. .. | | 1,000 | |
| Directors and auditors .. .. .. .. .. | | 2,100 | |
| Rates and taxes, 5*s.* 6*d.* in the pound, on an assessment of 15,429*l.* .. .. .. .. .. .. .. | | 4,244 | |
| | | | 85,655 |
| Net receipts .. .. .. .. | | | 58,034 |
| OCCUPIERS' SHARE:— | £ | | |
| Working capital .. .. .. .. | 50,000 | | |
| Present value of meters .. .. .. | 35,000 | | |
| Present value of retorts .. .. .. | 18,000 | | |
| Present value of fixtures and utensils .. | 97,000 | | |
| | £200,000 | | |
| | | £ | |
| Interest 5 per cent. thereon .. .. .. .. .. | | 10,000 | |
| Trade profits 10 per cent. thereon .. .. .. .. | | 20,000 | |
| Risks and casualties 2½ per cent. thereon .. .. .. | | 5,000 | |
| | | | 35,000 |
| Gross estimated rental .. .. .. | | | 23,034 |
| STATUTABLE DEDUCTIONS:— | | | |
| Probable average annual cost of renewals and insurance of buildings and apparatus .. .. .. .. .. | | £ 2,655 | |
| Annual sinking fund for renewal of trade-fixtures and utensils .. .. .. .. .. .. .. | | 3,000 | |
| Annual sinking fund for reproduction of mains and pipes | | 1,950 | |
| | | | 7,605 |
| Rateable value .. .. .. .. | | | £15,429 |

| | £ | |
|---|---|---|
| Rateable value of the whole works .. .. .. .. .. | 15,429 | 1866 |
| Estimated rateable value of stations (not including the meters, retorts, fixtures, and utensils, in respect of which above deductions are made) .. .. .. .. .. .. .. .. | 8,628 | THE QUEEN v. LEE. |
| Rateable value of mains and pipes .. .. | £6,801 | |

| | £ | | £ | | £ | | £ |
|---|---|---|---|---|---|---|---|
| As | 143,689 | : | 6,801 | :: | 5,144 | : | 243 |
| | Gross Receipts. | | Rateable Value of the Mains. | | Receipts in Lee. | | Rateable Value of the Mains in Lee. |

8. The court of quarter sessions reduced the items set down for law expenses and statutable deductions in the foregoing statement, but found, upon the evidence before them, that all the other deductions were proper to be made, and amended the rate by reducing the net value of the company's property in the parish of Lee from 1213*l.* to 364*l.*

9. It was contended, on behalf of the respondents, that the deduction which appears in the foregoing statement, of a percentage of 5 per cent. for interest, 10 per cent. tenant's profits, and 2½ per cent. for risks and casualties, upon "present value of meters," "present value of retorts," and "present value of fixtures and utensils," should not be allowed, inasmuch as the matters in respect of which the deduction was claimed, and which are more particularly described hereafter, were fixed to or connected with the land, and instead of diminishing, increased its value for the purposes of rating.

10. The meters in all cases are placed on the premises of the consumers. They are not in any way connected with the manufacture, nor are they indispensable, though used for the distribution of gas and the earning of profits. They are maintained in their position by being soldered to the service-pipes, which are made of lead. If the service-pipes were not required to be flexible, soldering would not be necessary, for the meters might be so placed as to remain in position without being fixed in any way. Meters are taken off when they require repair or renewal, or for other causes, and replaced by others, and when repaired are frequently placed in a different house and in a different parish. Their original cost was 45,000*l.*

11. The retorts are the instruments in which the coals are carbonized and the gas produced; and they consist not only of

1866

THE QUEEN v. LEE.

the circular pieces of clay to which the heat is applied, but also the arches which contain them, the pipes which permit the gas to ascend from them, the iron faces of them, and the pipes over the arches which convey the gas from them through the purifiers to the tanks where it is received by the gasholders. All the parts which are above the floor level are included in the term "retorts," and the whole of these parts are distinct and severable from the foundation or basement floor, and are not attached to it by mortar or cement, but are packed with fire-clay, which hardens by the action of heat, and holds them in their place. The parts of the retorts above the floor level are very perishable. By the wear and tear caused by the action of heat, and other processes of the manufacture of gas, they are soon rendered useless, and require to be renewed every two years. They are, therefore, so constructed as to be removeable without difficulty, and without injury to the basement on which they rest. The prime cost of the retorts required by the company is 24,000*l*.

12. Under the word "utensils" are included purifiers, steam-engines, boilers, and the moveable part of the gasholders.

13. The purifiers are massive iron vessels, standing on a brick base, but not fixed thereto. They are, however, connected on the one side with the pipes passing through the soil from the retorts in which the gas is produced, by screwed bolts fastened into the plates of the purifier; and on the other with main pipes, similarly attached, passing through the soil to the tanks and gasholders when the gas is stored for use. The purifiers may be described as groups of hollow cylinders or columns of iron, perpendicularly set up parallel to each other on the brick base, closed at the top by moveable lids, retained in their place by their own weight, and rendered gas-tight only by means of their edges resting in a water lute or circular channel containing water, and running round the top of the cylinder. The gas passes from the retorts through the purifiers to the tanks and gasholders, and in its passage is purified by chemical process. The present value of the purifiers in the aggregate is 35,000*l*.

14. The steam-engines are used for driving the machinery, pumps, &c., and are fastened by screw-bolts to a stone base fixed in the soil. By unscrewing the bolts the engines can be detached.

15. The boilers are set in brickwork, which is fixed in the soil. The present value of boilers and engines is 5000*l.*

16. The gasholders are hollow vessels of plate-iron, cylindrical in form, open at the bottom, but roofed in with the same material, which are used for storing the gas until required for consumption. They are not fixed in any way, but are so placed that as they fill with, or are emptied of, the gas, they rise and fall in circular tanks excavated beneath the surface of the soil, into which the gas passes through the purifiers from the retorts. Around the edges of these tanks are placed iron columns. The gasholders are fitted in their upper rim or edge with wheels, which run on the columns and guide the gasholder in its ascent. In some cases, also, chains are attached to the gasholder, and pass over the top of the columns. To the other end of these chains can be attached weights, by which the weight and pressure of the gasholder can be at pleasure regulated. It is usual and necessary at times to take down the gasholders for repair or other purposes, and they are easily taken down without injury to the foundation or any part of the structure. They do not last more than twenty years. The present value of the gasholders is 26,500*l.*

17. The balance of the 97,000*l.*, after deducting the present value of the purifiers, steam-engines, and boilers, and of the moveable part of the gasholders above described, represents the present value of various trade-fixtures, such as pumps and exhausters, which are fixed to the freehold, but under such circumstances and in such a manner that, under the law governing the right to remove fixtures, a tenant, who during his term had erected and fixed them for the purposes of his trade, would during his term have the right to sever and dispose of them. The original cost to the company of the property valued at 97,000*l.* exceeded this sum by 25,000*l.*

18. It was proved on the part of the appellants, and found as a fact by the court of quarter sessions upon the evidence before them, that according to the practice and course of business in letting and hiring gasworks, the tenant would have to take to and find capital for all the property comprised under the heads, meters, retorts, tenant's fixtures and utensils, and would have to provide 150,000*l.* for that purpose; and that a deduction in respect of such

1866

THE QUEEN v. LEE.

outlay was to be made in estimating, according to the provisions of the Parochial Assessment Act, what rent a tenant from year to year would be willing or reasonably be expected to pay.

19. They found that 17½ per cent. was a fair percentage to allow on "tenant's capital," for interest of money for his own trouble and skill, and for provision against risks and casualties: and allowed a deduction at that rate not only on the 50,000*l.*, which they found to be the amount of working capital which a tenant would require, but also on the further sum of 150,000*l.*

The question for the opinion of the Court of Queen's Bench was, whether it was competent for the quarter sessions to allow a deduction by way of tenant's profits in respect of any, and if any, of which of the matters and things comprised under the heads meters, retorts, tenant's trade-fixtures and utensils, the nature of which is above more particularly stated, and if the Court of Queen's Bench should be of opinion that in any of the above-mentioned cases it was not competent for the quarter sessions to allow a deduction, they were to amend the rate accordingly.

*Bovill, Q.C.*, and *J. C. Mathew*, for the appellants, in support of the order of sessions. The boilers may be conceded to be absolute fixtures, and therefore rateable. The meters, on the other hand, are as clearly merely moveable chattels; indeed, if anybody could be made to be occupiers of land by their means, it would be the occupiers of the houses, and not the company. As to the other articles, no doubt the cases of *Reg.* v. *Southampton Dock Company* (1), and *Reg.* v. *North Staffordshire Railway Company* (2), are strong cases against the appellants, but many of these articles are not so firmly fixed to the freehold; moreover, there is this very marked distinction, by the practice in the gas-trade (par. 18), the tenant has to find capital to purchase instead of paying rent for all these things.

[BLACKBURN, J. How can the rateable value of premises be affected by part of them belonging to the tenant instead of all to the landlord?

COCKBURN, C. J. It can make no difference whether the tenant

(1) 14 Q. B. 587; 20 L. J. (M.C.) 155.
(2) 30 L. J. (M.C.) 68.

pays so much annual rent or discounts it by paying the value at once.]

*O'Malley, Q.C.*, and *F. M. White*, for the respondents. The cases of *Reg.* v. *North Staffordshire Railway Company* (1) and *Reg.* v. *Southampton Dock Company* (2) are undistinguishable from the present; indeed, all the articles in question in the present case, with the exception of the meters, are more strongly attached to the freehold than they were in those cases.

[BLACKBURN, J., referred to *Hellawell* v. *Eastwood* (3)]

No doubt in that case machines were held not part of the freehold, although fixed to it, but the question there was only whether they were distrainable; and that is a very different question from the present. In *Reg.* v. *Southampton Dock Company* (4), Lord Campbell, C.J., treats it as solemnly decided that real property, such as buildings, to which machinery is attached for the purposes of trade, ought to be assessed according to its existing value, as combined with the machinery, without considering whether the machinery be real or personal property, or whether it be liable to distress or seizure under a *fi. fa.*, or whether it go to heir or executor, or at the expiration of a lease to landlord or tenant: citing *Rex* v. *Birmingham and Staffordshire Gas Light Company.* (5) And this disposes of the argument founded on the 18th paragraph of the case: the assessment is to be founded not on what the actual tenant has to give, but what the hypothetical tenant would give as rent for the premises as gasworks as they stand. Any particular usage cannot alter the general liability to or mode of making rates: *Rex* v. *Hogg.* (6) Lastly, the meters are the property of the gas company, and are attached to their pipes; and they would by them occupy part of the freehold of the houses in which they are put up: *Forrest* v. *Greenwich.* (7)

[BLACKBURN, J. There no doubt the appellant occupied part of the freehold by his barge and its moorings.]

(1) 30 L. J. (M. C.) 68.
(2) 14 Q. B. 587; 20 L. J. (M.C.) 155.
(3) 6 Ex. 295; 20 L. J. (Ex.) 154.
(4) 14 Q. B. at p. 610; 20 L. J. (M. C.) at p. 162.
(5) 6 Ad. & E. 634.
(6) 1 T. R. 721.
(7) 8 E. & B. 890; 27 L. J. (M. C.) 96.

1866

THE QUEEN v. LEE.

COCKBURN, C. J. Whatever doubt there might be in the case at the commencement of this discussion has been removed by the arguments. In the first place I agree entirely that we are not to look at the position of the particular tenant,—that he has had to pay so much money down for the machinery and fixtures, which are necessary for carrying on the works; but we must look at what, as the whole concern stands, would be the rent that an imaginary tenant would give for it as a whole, excluding from consideration whatever would be mere chattels, and would therefore not pass under a demise from the actual to the imaginary tenant. The way being thus cleared, the case presents, I think, no real difficulty to our deciding in respect of which of the various items the company are entitled to have any deduction allowed in order to ascertain the rateable value of their premises.

First, I think Mr. White has altogether failed in shewing that the meters are anything more than ordinary chattels. The other things, it is plain, fall under one of two classes of articles which are to be taken into account as enhancing the value of the building. The retorts, I am satisfied, are so far fixed to the freehold as to be attached and secured to it, and to become part of it, and they must be treated, therefore, not as removeable fixtures, but as fixtures so connected with the freehold as to have become parcel of it. With regard to them, there is no difficulty; they are rateable as any part of the entire freehold would be. The other items seem to me, one and all, to fall within the principle of the cases referred to in the argument, *Reg.* v. *Southampton Dock Company* (1), and *Reg.* v. *North Staffordshire Railway Company*. (2) In the latter case the Court, after time taken to consider, laid down this rule: that when things which, though capable of being removed, are yet so far attached as that it is intended that they should remain permanently connected with the railway or other undertaking, or with the premises used with it, and remain permanent appendages to it, as essential to its working, those must be taken to be things increasing the rateable value of the land, and in respect of which the company are not entitled to have a deduction made. That principle applies directly

(1) 14 Q. B. 587; 20 L. J. (M.C.) 155.
(2) 30 L. J. (M.C.) 68, 72.

1866

THE QUEEN v. LEE.

to the present case. There can be no doubt that the purifiers and the gasholders are parts of the works which are absolutely necessary for the manufacture of gas, which is the purpose of the undertaking. There can be no doubt that it was intended, when those things were erected, that they should remain permanently connected with the premises; that they should remain permanent appendages to it as essential to its working. They therefore fall within the rule laid down by the Court in that case. If the company desired to abandon this undertaking, and to let the gasworks to another company or any individual, what the lessee would propose to take and pay rent for would not be land independent of all these articles, all of them essential to the manufacture, viz., gas. The retorts, purifiers, and gasholders are all as essential to the using and occupying these premises as gasworks, as any other thing that can possibly be suggested, however permanently attached to the freehold. They seem, therefore, clearly to come within the principle laid down in that case.

There is another principle applicable here, on which the Court proceeded in the case of *Walmsley* v. *Milne*. (1) The facts in that case were, the owner of land mortgaged it in fee, and afterwards erected certain buildings on it, to which for the more convenient use of the premises in his business of an innkeeper, brewer, and bath proprietor, he affixed a steam-engine and boiler, a hay cutter, a malt mill or corn crusher, and a pair of grinding-stones. The lower grinding-stone was boxed on to the floor of part of the premises by means of a frame screwed thereto, the upper one being fixed in the usual way; and the steam-engine and other articles, except the boiler, were fastened by means of bolts and nuts to the walls or the floors, for the purpose of steadying them, but were all capable of being removed without injury either to themselves or to the premises. (So here it is possible that some of the articles, the steam-engine, the purifier, and the gasholders, may be removed without injury to themselves or the premises.) The Court say first (2), it appears that, as a matter of fact, all those articles were "firmly annexed to the freehold for the purpose of improving the

(1) 7 C. B. (N.S.) 115; 29 L. J. (C.P.) 97.
(2) 7 C. B. (N.S.) at pp. 131, 138; 29 L. J. (C.P.) at pp. 98, 101.

1866

THE QUEEN v. LEE.

inheritance, and not for any temporary purpose." And then the Court give their opinion on that state of facts,—"When the mortgagor (who was the real owner of the inheritance), after the date of the mortgage, annexed them to the inheritance for a permanent purpose, and for the better enjoyment of his estate, he thereby made them part of the freehold which had been vested by the mortgage-deed in the mortgagee, and consequently the plaintiffs, who are the assignees of the mortgagor, cannot maintain the present action."

So here we cannot doubt, as a matter of fact, that when these purifiers, gasholders, steam-engines, and boilers, which are absolutely essential to the working of the manufacture, were erected, it was with the view to their remaining permanently there for the benefit of the inheritance. I therefore think, on both grounds, these articles (except the meters) must be considered, if not as forming part of the freehold, still as so far connected with it as to be intended to be permanently attached to it, and therefore they ought to be taken into account in determining the rateable value of the land and the premises in question, and that no deduction can be allowed in respect of them. I think, therefore, that the sessions were wrong in allowing these deductions, and that they must be disallowed, and the rate increased pro tanto.

BLACKBURN, J. I am of the same opinion. The rateable value of the premises is to be determined, under the Parochial Assessment Act, according to the rent that a hypothetical tenant, making the suitable deductions, would give for the rateable property; and the sessions have quite properly proceeded to try to ascertain that rent. The property in this parish is a portion of a much larger property which the gas company possesses in this parish and in others. The first thing the sessions had to do was to ascertain the rateable value of the entire property which the company possessed, and afterwards to see what proportion of it belongs to this parish. Now, in proceeding first to get at the value of the entire property, as it was not a thing which in practice is let to a tenant, the value cannot be ascertained by what people would give for it in the market; and the sessions had, as is common in these cases, to ascertain for themselves what the value would be, looking at the

elements which a tenant would take into consideration on renting from year to year. The question is, as was conceded, what would a hypothetical tenant give for the whole of the rateable property; and although, in point of fact, as stated in paragraph 18 of the case, the person who actually did occupy would not pay rent for portions of the property which are fixed to the rateable premises so as to become part of it, but which would be capable of removal, because, instead of paying rent, he would purchase them, yet we are agreed we must look to what a hypothetical tenant, taking the premises as they stand, would give for them, with those portions which were annexed to the property, so as, in effect, to become part of the rateable property. Upon that principle, the sessions were wrong. I take it that it is quite clear that the principle established by the cases is this,—to take an illustration: If you are rating a house let furnished, you would ascertain how much was paid in respect of the furniture and the things in no way forming part of the rateable premises, and deducting that from the rent paid for the furnished house, the remainder would be the rent given for the house itself, for which it would be rateable. The question, then, would arise, and must arise, what the things are for which you are to make an allowance and deduction, whether they are in themselves part of the premises, or are, like the furniture, not part of the premises. Now, there are some fixtures that are attached to the premises and are part of the premises, although, as between landlord and tenant, and heir and executors, there is a right to remove them. Clearly, no allowance is to be made for those. There are other things, such as moveable furniture, which are manifestly not part of the house, and for which allowance must be made. But there are intermediate things, with respect to which it is sometimes very difficult to determine whether they are made part of the premises or not; and upon those the question mainly arises in the present case. The rule laid down has been that, where the things are attached to the premises so as to be part of the premises, although they are removeable, still they are part of the premises, although there may be a right to remove them. But if things or chattels be fixed to the premises, but so as to be still chattels, being only fixed and steadied for the purposes of use there, they remain

1866

THE QUEEN v. LEE.

chattels altogether, so that they would not be part of the premises at all; they would never cease—to use the phrase in the case of *Hellawell* v. *Eastwood* (1)—to have the character of moveable chattels; although fixed for the purpose of the enjoyment of them, still they remain moveable chattels. The common illustration is a mirror, which, in the ordinary way, would be screwed to the wall; still it remains a moveable chattel, and is no part of the premises. On the other hand, a grate which is built into a chimney, although it is capable of being removed by a tenant, would still be fixed to the premises, so that it would be part of the premises, and therefore part of what would be considered to be let to the hypothetical tenant, and for which he would pay rent. The difficulty is, to apply the distinction to the present case. We find in the case of *Hellawell* v. *Eastwood* (2), the Court of Exchequer were dealing with machinery that was fixed and screwed, and attached to the premises; and they laid down the rule, as being "a question of fact depending upon the circumstances of each case, but principally on two considerations: first, the mode of annexation to the soil or the fabric of the house, and the extent to which the thing is united to them, whether it can be easily removed *integre, salve, et commode*, or not, without injury to itself or the fabric of the building; secondly"—and this is what I am calling attention to—"on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the civil law, *perpetui usus causâ*, or in that of the Year Book (3), *pour un profit del inheritance*, or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel." In that case the Court of Exchequer thought the things were only put up and fastened in such a way as to be for the temporary use and enjoyment as chattels; but they put it clearly and distinctly that the two important elements to consider are, first, the degree of annexation; and, secondly, if it be in fact annexed, the object of the annexation, whether it was for the improvement of the inheritance that it was attached to a part of the inheritance, or whether it was for the enjoy-

(1) 6 Ex. at p. 313; 20 L. J. (Ex.) at p. 160.
(2) 6 Ex. at p. 312; 20 L. J. (Ex.) at p. 160.
(3) 20 H. 7, 13, pl. 24.

ment only of the thing itself. In the case that my Lord referred to, of *Walmsley* v. *Milne* (1), which was very nearly a similar case, as far as the facts went, to *Hellawell* v. *Eastwood*, the Court of Common Pleas laid down the same rule; and came to the conclusion that the machinery and things were firmly fixed to the freehold for the purpose of improving the inheritance; and, taking that view, they thought them attached to the inheritance so as to become part of it. That is the rule laid down there, and the definition as to when the thing ceased to be a chattel, so as to become part of the inheritance, although it might be removed. That was the principle laid down (though not in the precise words, the same idea is conveyed) in the case of *Reg.* v. *North Staffordshire Railway Company* (2), where the things in question were similar to those in *Reg.* v. *Southampton Dock Company*. (3) Deductions were claimed for cranes, turn-tables, and a variety of other things which were attached to the premises of the railway company, some of them firmly attached and some of them not. The Court said that the things which were not attached to the freehold were to be deducted, and an allowance made for them, and the things which were affixed to the freehold clearly would not be allowed for. Then the rule laid down for the guidance of the sessions was this. "The articles may be divided into three classes: first, things moveable, such as office and station furniture." It is clear these are not to be included. "Secondly, things so attached to the freehold as to become part of it." It is clear, on the principle of all the cases, that no deduction is to be made for them, and they are to be considered as part of what is let. "Thirdly, things which, though capable of being removed, were yet so far attached as that they were intended to remain permanently connected with the railway or the premises used with it, and to remain permanent appendages to it, as essential to its working." That phrase, as it appears to me, contains the same idea as is stated in the case of *Hellawell* v. *Eastwood* (4), where the test is said to be, citing from the Year Book (5), whether the thing be fixed *pour un profit del in-*

(1) 7 C. B. (N.S.) 115; 29 L. J. (C. P.) 97.
(2) 30 L. J. (M.C.) 68, 72.
(3) 14 Q.B. 587; 20 L. J. (M.C.) 155.
(4) 6 Ex. at p. 312; 20 L. J. (Ex.) at p. 160.
(5) 20 H. 7, 13, pl. 24.

1866

THE QUEEN v. LEE.

*heritance;* and again as in the case of *Walmsley* v. *Milne* (1), where it was said the question was, whether the articles were annexed for the better enjoyment of the estate. The idea is throughout the same—if the things are annexed, though but slightly, with a view to the enhancement of the inheritance and the permanent improvement of it, they may be considered as part of it for which a hypothetical tenant would be considered rateable. Now, applying that rule to the present case, though I was inclined at first to take an opposite view as to some of these articles, they are all, with the exception of the meters, attached to the premises, although but slightly; nevertheless I think it is clear they all are in fact attached to the premises, and equally clear they all are in fact attached to the premises with the view of enhancing the benefit of the premises, so as to come within the principle laid down in the cases I have mentioned. The meters stand on a different footing. They are chattels themselves, except so far as they are attached to the houses in which they are put up. They are attached to the houses by a pipe which comes in through the wall and is fastened to the meter. If the meter was attached to the house so as to render it part of the house to improve it, then it would become fixed property. But, in fact, it is obvious that the meters are kept as the company's meters, to be used as their chattels for measuring the gas, and were never intended to be for the benefit of the house to which they are attached at all; they are not part of the inheritance of the company, and cannot be said to be so. Mr. White endeavoured in his argument to make out that a meter occupies part of the space of the house, and therefore the company did by the meter occupy part of the house. That is not so. Although the meter is firmly fixed to the house, steadied by being fixed, that does not make the company the occupier of any portion of the house; any more than a person who has hired out or let a chattel which is not fixed to the house but enjoyed as a chattel. For these reasons I think the meters are properly matters of deduction, and the rest are not. The rate must be amended accordingly.

LUSH, J. I am of the same opinion. The sum to be ascertained

(1) 7 C. B. (N. S.) 115; 29 L. J. (C. P.) 97.

is, "the net annual value of these premises at which they might reasonably be expected to let from year to year free of all usual tenant's rates and taxes, and deducting the probable average annual expenses necessary to maintain them in a state to command that rent." The question is, what is the rateable subject which is comprised within the premises to be rated? Now I apprehend that the premises to be rated are to be taken as they are with all their fittings and appliances by which the owner has adapted them to a particular use, and which would pass as a part of the premises by a demise of them to a tenant. That seems to me to express what in other words has been expressed in the cases referred to by the other members of the Court. Wherever the things have become so far a part of the premises that they would pass by a demise of these premises they would form a part of the rateable subject of the inheritance for the purpose of rating. When we have to apply that test to any particular thing, the question is not what a tenant might remove, nor what might be taken in execution, but what as between landlord and tenant would pass as a part of the premises which he would let and the tenant would take. Now, applying that rule, I cannot entertain a doubt that, with the exception of the meters, all the subjects of discussion here would pass as a necessary part of these premises. Without the retorts, purifiers, steam-engines, and gasholders, the premises would be worthless for the purpose for which they were erected; the building would not be a gas manufactory at all. All these things are fixed, and so far annexed, as to be intended to be permanent, and as really necessary for the use of the premises as gasworks. Therefore, I think, except the meters, that deductions in respect of none of these items ought to be allowed in ascertaining the ultimate net annual value. The meters are on a different footing and in no sense a part of the gasworks. They are not upon the land occupied by the company, and are not fixed in such a way as to be a part of the freehold.

I was struck in the early part of the argument with the finding in the 18th paragraph of the case. It appeared to me to distinguish this from the other cases, and for a time I entertained considerable doubt whether, on account of what was found there,

1866

THE QUEEN v. LEE.

all these items, although forming part of the rateable premises, ought not to be deducted. The finding is "that according to the practice and course of business in letting and hiring gasworks, the tenant would have to take to and find capital for all the property comprised under the heads, meters, retorts, tenant's fixtures and utensils, and would have to provide 150,000*l.* for that purpose, and that a deduction in respect of such outlay was to be made in estimating, according to the provisions of the Parochial Assessment Act, what rent a tenant from year to year would give." It struck me at first, as the tenant would be bound, if he took these premises, to make an outlay by purchasing all these articles, and the rent he would pay would be so much less, that that rent would represent the rateable value. Upon consideration, I quite agree with the other members of the Court, and I am satisfied that that is not the right view, on the hypothesis that all these things, except the meters, do form part of the rateable subject, and ought to be taken into consideration in estimating the rateable value; for to say, that because a tenant and a landlord agree, before the place is let, that the tenant should pay down a price for part, that is, purchase part of the freehold, the rateable value would be by so much diminished, would be absurd. I agree, therefore, that it makes no difference at all whether the tenant rents the whole, or whether by contract between him and the landlord he purchases the fixed plant, which, if not so purchased, would be a part of the permanent premises; and that, except the meters, all the other matters are rateable, and that the deductions in respect of all of them ought to be disallowed.

*Rate to be amended accordingly.*

Attorneys for appellants: *Young, Jones, Vallings, & Roberts.*
Attorney for respondents: *F. W. Smith.*

TRIGGS, APPELLANT; LESTER, RESPONDENT. 1866 Jan. 20.

*Cattle—"Conducting" or "Driving" Cattle—Sunday.*

A local act for a parish, in which was a large cattle market, enacted, that it shall not be lawful for any drover or other person to conduct or drive through any of the streets in the parish any oxen, sheep, or other cattle, during Sunday :—

*Held*, that a person driving a van with horses, in which were calves being conveyed to the market, was not "driving" or "conducting" cattle within the meaning of the statute.

CASE stated, under 20 & 21 Vict. c. 43, by one of the magistrates of the Clerkenwell police court.

A complaint was preferred by the respondent against the appellant, under the Islington Parish Act, 1857 (20 & 21 Vict. c. xxi.), charging, that the appellant, on Sunday, 9th July, 1865, did conduct in and through the Canonbury Road, within the parish of Islington, fourteen calves, in a van, between the hours of eleven and twelve o'clock in the morning, contrary to the provisions of the act.

The Islington Parish Act 1857 (20 & 21 Vict. c. xxi.),—after reciting the former Islington Act (5 Geo. 4, c. cxxv.), and the Metropolitan Market Act (14 & 15 Vict. c. 61), and that since the establishment of the market under the latter act, the number of oxen, sheep, &c., driven into the parish on the Sunday had greatly increased, to the great inconvenience, annoyance, and danger of the Queen's subjects; and that the time limited by s. 111 of the first act, namely between 11 A.M. and 4 P.M., during which oxen, &c., were not to be driven through the parish on Sundays, had been found wholly insufficient for the convenience, protection, and safety of the Queen's subjects residing therein, passing through the streets on their lawful business, and to and from their places of worship; and that it was expedient for the remedy thereof, and to prevent the desecration of the Lord's Day, that s. 111 of the first should be repealed, and further and more effectual provisions made,—by s. 1 repeals the said 111th section, and by s. 3 enacts, "That it shall not be lawful for any drover or other person to conduct or drive in, upon, or through any of the roads,

1866

TRIGGS v. LESTER.

lanes, streets, squares, or other places, or on or over any of the footpaths which now are or hereafter may be within the parish of Islington, any oxen, sheep, swine, or other cattle, between the hours of twelve of the clock on any and every Saturday night throughout the year, and twelve of the clock on any and every Sunday night throughout the year," under a penalty not exceeding 5*l.*, or in default imprisonment not exceeding three months.

At the hearing it was proved on the part of the respondent that on the day and time alleged the appellant was driving horses, drawing a van, in which van there were fourteen calves being conveyed to the cattle market, and that he had the care and custody of the calves and was taking them to the cattle market.

It was contended on the part of the appellant, that the fact of the appellant being engaged in driving horses drawing a van containing calves did not constitute an offence under the act; and the fact of driving the horses drawing the van so containing the calves, did not come within the terms of the third section of the statute, not being conducting or driving the calves; and that it was essential that the person charged should be shewn to have been conducting or driving cattle through the streets on their legs, and not conveying them in a vehicle.

The magistrate, being of opinion that the evidence brought the case within s. 3 of the statute, and that the passing of large numbers of cattle in vans was calculated to cause great inconvenience and annoyance to the Queen's subjects, convicted the appellant.

The question for the Court was, whether conveying calves in a van, drawn by horses, was a "conducting" or "driving" within the statute.

*Underdown*, for the respondent. The intention of the act, as shewn by the preamble, was to prevent cattle passing through the parish to the market at all during Sunday. One of the definitions of "to drive" given in Johnson's Dictionary is "to convey animals." It is not only a drover, but any person, who is forbidden to conduct or drive cattle on Sunday. If it be allowable for cattle to be conveyed in vans on Sunday, half the mischief intended to be obviated will remain. The desecration of the sabbath is one of the objects intended to be prevented.

*Besley*, for the appellant, was not heard.

1866

TRIGGS *v.* LESTER.

*Per curiam.* (COCKBURN, C.J., BLACKBURN and LUSH, J.J.) The "driving or conducting" cattle intended in the statute, must be the ordinary driving, when the cattle are themselves driven.

*Conviction quashed.*

Attorney for appellant: *T. Beard.*
Attorney for respondent: *J. Layton.*

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MORRIS, APPELLANT; JEFFRIES, RESPONDENT.

*Jan.* 20.

*Highway—Turnpike—Cattle "wandering, straying, or lying" upon the Road—4 Geo. 4, c. 95, s. 75.*

Horses grazing on the side of a turnpike road, with a man in charge of them, they being under his control, are not liable to be impounded under 4 Geo. 4, c. 95, s. 75, as "wandering, straying, or lying" about the road.

CASE stated by justices of Gloucestershire, under 20 & 21 Vict. c. 43.

An information was preferred by the appellant against the respondent, charging that he did on, &c., unlawfully release four horses, the property of the respondent, which were then on the way to the pound, &c., for the purpose of being impounded, before the said four horses had been discharged by due course of law, the same having been before then lawfully seized by the appellant, and so impounded in consequence of their having been found lying and straying on the turnpike road, not being such part of the said road as did lead or pass through or over any common or waste or uninclosed ground, contrary to the form of the statute in such case made and provided.

Upon the hearing of the information the following evidence was given.

The appellant was employed by the surveyor of the turnpike road leading from Stow-on-the-Wold to Cirencester to impound any cattle that are grazing on the turnpike roads. On the 30th of July, 1865, he saw four horses, belonging to the respondent, on

1866

MORRIS v. JEFFRIES.

the sides of the said turnpike road leading from Stow-on-the-Wold to Cirencester. They were grazing on the herbage there. There was a man in charge of them about four or five yards from them. The appellant drove them along for the purpose of impounding them. He met the respondent and his son. They ordered the carter to take them home. The horses were taken away from the appellant.

The respondent submitted that he could not be convicted, upon two grounds:— First, that there must be a lawful seizure, and that it had been proved that the horses seized were attended by a keeper, and therefore were not found lying or straying about the turnpike road, and that as long as they had a keeper with them no offence was committed by the respondent under section 75 of 4 Geo. 4, c. 95. (1) He referred to section 74 of 5 & 6 Wm. 4, c. 50 (repealed by section 25 of 27 & 28 Vict. c. 101), and also to the said section 25, and submitted no offence was committed whilst there was a keeper with the horses. He also referred to *Sherborn* v. *Wells*. (2) Secondly, that if the seizure was unlawful, no offence was committed by the respondent under section 123 of 3 Geo. 4, c. 126, in releasing the horses.

The justices were of opinion that, as the respondent's horses were with a keeper, and appeared to be under the control of the respondent's carter, who had charge of them, they were not straying, and were therefore not liable to be seized by the appellant under section 75 of 4 Geo. 4, c. 95. They therefore dismissed the case. They were, nevertheless, of opinion that the practice of turning out loose horses on the sides of a turnpike road for the purpose of grazing, although attended by a keeper, was an obstruction to the user of the road by the public; and that the herbage of the waste

(1) 4 Geo. 4, c. 95, s. 75: "If any horse, ass, sheep, swine, or other beast or cattle of any kind, shall at any time be found tethered, or wandering, or straying, or lying about any turnpike road, or any part thereof (except on such parts of any road as lead or pass through or over a common or waste or uninclosed ground), it shall be lawful for any surveyor of the same, or other person, to seize and impound such horse, &c., in the common pound of the parish, &c., and there to detain it till the owner pay 2*s*. and reasonable expenses to the surveyor of the road. . . . Provided that nothing in this clause shall be deemed to take away any right of pasturage which may exist on the sides of any turnpike roads."

(2) 3 B. & S. 784; 32 L. J. (M.C.) 179.

on the sides of the metalled road could not be lawfully grazed by the respondent's horses.

The appellant contended that any horse, ass, sheep, swine, or other cattle, turned loose on a turnpike road, is straying, whether with or without a keeper; 2nd, that horses turned loose are an obstruction to the user of the road by the public, and are within the purview of the 75th section of the 4 Geo. 4, c. 95, whether they are or are not attended by a keeper; 3rd, that the respondent had no right whatever to the herbage on the sides of the turnpike road, not being either owner or occupier of land on the sides thereof, where the horses were grazing; 4th, that section 74 of the Highway Act, 5 & 6 Wm. 4, c. 50, contains the words straying, &c., "without a keeper," but that the amended act, 27 & 28 Vict. c. 101, s. 25, repeals section 74, and omits the words "without a keeper;" and that the proper construction of section 75 of 4 Geo. 4, c. 95, is, that horses turned loose, but with a keeper, to graze the herbage on the sides of the turnpike road, are straying, and are liable to be seized and impounded under that section.

The questions for the opinion of the Court were, 1st, Whether there was sufficient evidence given to enable the justices, in point of law, to convict the respondent of releasing the horses seized to impound; 2ndly, Whether the respondent's horses, being with a keeper on the turnpike road, and grazing the herbage on the sides thereof, were liable to be seized and impounded, under the 75th section of 4 Geo. 4, c. 95, and, if so, whether the respondent was liable to be convicted, under section, 23 of 3 Geo. 4, c. 126, upon the information, for releasing the said horses so seized to impound.

*T. S. Pritchard*, for the appellant. The intention of the legislature, by the 4 Geo. 4, c. 95, s. 75, was to prevent the obstruction caused by the pasturing of cattle by the sides of turnpike roads, except where there may be a right of pasturage, which the respondent had not. Cattle may be lying about a road just as much with a keeper as without. The case of *Sherborn* v. *Wells* (1) was under a different statute, the words of which were, "any horse turned loose."

(1) 3 B. & S. 784; 32 L. J. (M.C.) 179.

1866

MORRIS v. JEFFRIES.

The respondent did not appear.

*Per curiam.* (COCKBURN, C.J., and BLACKBURN, J.) The presence of a keeper is not conclusive; but it was a question for the magistrates whether the horses were "wandering, straying, or lying" about the road, and, as they were of opinion, upon the evidence, that the horses were under the control of the man in charge of them, they were right in refusing to convict.

*Appeal dismissed.*

Attorneys for appellant: *Wilkins & Blyth.*

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[IN THE EXCHEQUER CHAMBER.]

*Feb.* 2.

M'CREA *v.* HOLDSWORTH AND OTHERS.

*Copyright of Designs Acts*, 5 & 6 *Vict. c.* 100, *ss.* 3, 15, 21 & 22 *Vict. c.* 70, *s.* 5—*Registration of Pattern itself.*

The plaintiff registered, in class 12 (s. 3 of 5 & 6 Vict. c. 100), without anything more, a piece of cloth having woven upon it a chain-work ground, with shaded and bordered six-pointed stars arranged in a quincunx:—

*Held*, that, by the 21 & 22 Vic. c. 70, s. 5, this was sufficient registration of the entire pattern as the "design;" but that the whole combination only, and no single parts of it, although new, would be protected.

The question of novelty and infringement is for the jury; but it is for the Court, looking at the article registered, without the aid of the jury, to say whether the registration is sufficient.

aff'd 6 H&N. 2 H.L.Ca. 380

APPEAL from the decision of the Court of Queen's Bench discharging a rule to enter a verdict for the defendants.

Declaration that the plaintiff was, within the meaning of the 5 & 6 Vict. c. 100, the proprietor of a new and original design, applicable to the ornamenting woven fabrics comprised in class 12 mentioned in the statute (s. 3), and that (amongst other matters necessary to entitle the plaintiff to maintain the action), before the publication of the design and before the alleged infringement, the plaintiff caused the design to be and it was duly registered according to the provisions of the statute, and at the time of such registration the plaintiff caused the design to be and it was registered in respect of the articles of manufacture, that is to say,

woven fabrics comprised in class 12, by specifying the number of the class in respect of which such registration was made; and the plaintiff also caused his name to be and his name was then duly registered according to the statute as proprietor of the design; that the defendants wrongfully, and without the consent in writing of the plaintiff, applied the design, and divers fraudulent imitations thereof, for the purposes of sale, to the ornamenting of woven fabrics comprised in class 12, to which the plaintiff had the sole right of applying the design.

Pleas. 1. Not guilty. 2. That the plaintiff was not the proprietor of the design. 3. That the plaintiff did not cause the design to be nor was the same duly registered. 4. That the design was not new nor original.

Issue thereon.

Pursuant to a judge's order, the plaintiff delivered particulars as follows:—

The following are the particulars of what is claimed by plaintiff as a novelty in the plaintiff's registered design in the declaration mentioned, viz., the particular collocation of the shaded and bordered stars upon the ornamented chain surface, as shown in the registered pattern, thus forming together the ornamentation of the woven fabric.

The cause came on to be tried (for the second time) at the sittings in London after Hilary Term, 1864, before Cockburn, C.J.

The mode in which the plaintiff had effected the registration of the design was by furnishing to the registrar of designs appointed under the above statute two similar patterns or portions of the woven fabric in class 12 to which the same had been applied, accompanied with the name, style, and address of the plaintiff, as the proprietor, and by specifying the number of the class, namely, class 12, in respect of which the registration was made; but neither copy, drawing, print, specification, nor description in writing was furnished with the patterns to the registrar, and thereupon the registrar gave to the plaintiff a certificate of registration, such certificate having annexed to it one of the aforesaid patterns or portions of the woven fabric so furnished by the plaintiff. The piece of woven fabric was of a material called Pekin cloth, about twelve inches or more square, having woven

1866

M'CREA v. HOLDSWORTH.

upon it a chain-work ground, with shaded and bordered six-pointed stars arranged in a quincunx. (1)

The plaintiff claimed the combination of the particular stars on the particular ground-work in the manner shewn by the registered pattern, as forming one design applicable to the ornamentation of woven fabrics comprised in class 12. But he did not contend that the ground-work of the piece of fabric so registered was of itself alone at the time of the registration new and original; and it appeared in evidence that the same had for some time previously been known as the Albert chain pattern.

At the close of the plaintiff's case the counsel for the defendants contended that the defendants were entitled to the verdict on the third plea, inasmuch as there had not been any sufficient registration of the design claimed by the plaintiff according to the Copyright of Designs Act, and leave was given to the defendants to move the Court of Queen's Bench on that point. The defendants also contended that as a matter of fact it was doubtful what the design the plaintiff had thus registered really was, and that the plaintiff could under such registration claim one or other of several different designs. The defendants called a large number of witnesses to disprove the novelty of the star.

The jury, in answer to specific questions put to them by the Chief Justice, found, first, that the star was new and original, secondly, that the combination of the star on the particular ground-work as shewn in the registered pattern was a new and original design applicable to the ornamentation of woven fabrics comprised in class 12; and thirdly, that the combination was the design which the plaintiff intended to register, and had in fact registered; and they also found that the defendants had infringed this design. The verdict was thereupon entered for the plaintiff, subject to the aforesaid leave to enter a verdict for the defendants on the third plea, on the ground that the registration was bad in point of law.

A rule nisi was obtained accordingly, on the ground that the registration was bad in point of law, because it cannot be collected

(1) The original certificate of registration, with the piece of the woven fabric annexed, was produced by the plaintiff in court on the argument of the case.

with reasonable certainty from the article of manufacture furnished to the registrar what the design was which the plaintiff intended to register as applicable to it; and because the registration enabled the plaintiff, at his option, to claim one or other of several designs, and not one design only, applicable to woven fabrics comprised in class 12 mentioned in section 3 of the 5 & 6 Vict. c. 100.

The rule was argued before the Court of Queen's Bench in Trinity Term, 1864, and was discharged. (1)

*Manisty, Q.C.* (with him *Kemplay*), for the appellants, the defendants. The registration of this pattern was insufficient; the difficulty of ascertaining what was the design intended to be registered and protected shews this. The 5th section of the 21 & 22 Vict. c. 70, enacts "that the registration of any pattern or portion of an article of manufacture to which a design is applied, instead or in lieu of a copy, drawing, print, specification, or description in writing, shall be as valid and effectual to all intents and purposes as if such copy, drawing, print, specification, or description in writing had been furnished to the registrar under the Copyright of Designs Act;" but it is to be observed that while s. 15 of the 5 & 6 Vict. c. 100, enables the registration of copies, drawings, or prints, s. 8 of the 6 & 7 Vict. c. 65, enables only registration of drawings or prints, with a description, if necessary; so that the act of 21 & 22 Vict., which recites both the former acts, may well in section 5 be only intended to remedy the omission, and to enable the registration of articles of utility, (to which the act of 6 & 7 Vict. extends), by copies or the article itself: and it is to be remembered that the act of 6 & 7 Vict. is confined to the shape or configuration of the article, which may very well be represented by a pattern or the article itself; whereas, under the 5 & 6 Vict. designs for ornamentation are more complex, and must still have description of some kind in order to make plain what the design is: *Norton* v. *Nicholls*. (2) At all events, unless the design is so simple as to appear at once, the 5 & 6 Vict. c. 100, s. 15, must be complied with. (3) Here the

(1) See report in the court below, 33 L. J. (Q. B.) 329; 5 B. & S. 495.

(2) 1 E. & E. 761; 28 L. J. (Q. B.) 225.

(3) See also 13 & 14 Vict. c. 104, s. 11.

5 Jur. N.S. 1203.

1866

M'CREA v. HOLDSWORTH.

pattern was open to so many constructions that it became a question for the jury what the design intended to be registered was. It is quite uncertain whether the ground, the star, or the arrangement of the stars, or all three, is the design.

[ERLE, C.J. In *Norton* v. *Nicholls* (1), the Court having the article before them, held the design not to be shewn. Here, the jury have found what the design was; but is it not the duty of the Court alone to say whether the pattern discloses the design or not?

POLLOCK, C.B. I take that question to be for the Court.]

The members of the Court below treated the question as decided by the finding of the jury; but it must be a question for the Court to say, without extrinsic evidence, what the design is; and that, in the present case, is impossible, without some description or statement of what the plaintiff claims to register as the design.

[*Mellish, Q.C.*, contrà. There is not only nothing in section 5 of 21 & 22 Vict. c. 70, obliging the person registering to give a description, but nothing enabling him to do so, where he registers a pattern or a piece of the article itself.]

No doubt that is so, if the design be simple; but if the design be complicated, and the designer chooses to register the article or pattern itself, he must condescend to particulars, and add something to make it plain what design he has registered, or, if he leaves it doubtful, he must be taken not to have registered anything. This very case shews the hardship on the public. After a former trial, it became necessary to obtain particulars—to ascertain what it was that the plaintiff claimed as a novelty in the thing which he has registered.

*Mellish, Q.C.* (with him, *Gray, Q.C.*, and *Philbrick*), for the plaintiff, was not heard.

ERLE, C.J. We are of opinion that the judgment of the Court below should be affirmed.

The question is, whether the Copyright of Designs Acts have been sufficiently complied with by leaving with the registrar a pattern of the design which the plaintiff claims; and I think that,

(1) 1 E. & E. 761; 28 L. J. (Q. B.) 225.

5 Jur. N.S. 1203

looking at the last act, 21 & 22 Vict. c. 70, the intention of the legislature is carried into effect by holding that the registration of this pattern alone, which is before the Court, is a compliance with the statutes, and entitles the plaintiff to have the sole property in this design. I take the design as an entirety. Every part of this which is registered, and nothing but the entire combination, is the thing that is before the public. It is the star, the collocation of the stars, the shading of the stars, and the Albert ground: it is the combination that forms the design in this specimen. A smaller piece would not give a correct idea of what was the design that the plaintiff intended to have protected. I am of opinion that there is no danger to the public at all in holding that such a registration is sufficient, and by holding that there can be no infringement unless the entire combination is appropriated; and I am clearly of opinion that, if a person copied the star by itself, or the chain pattern by itself, though each were new, no action would lie against him by the person who has registered this design. The stars, the collocation of the stars, and the placing of them on an Albert ground, is the design; and if a person chooses to follow that exact combination, an action lies against him. The question whether the design has been infringed, and whether the design itself was new or old, is for the jury. But it seems to me that, sitting as a member of the Court, with the pattern before me, and having nothing to guide me except my own knowledge of the subject, it must be a question for the Court, looking at the statute, and looking at the pattern itself, whether the requirements of the statute have been complied with. The judge is to decide judicially; and the Court, without the aid of a jury, holds that this registration is sufficient.

The judgment, therefore, of the Court of Queen's Bench must be affirmed.

POLLOCK, C.B., MARTIN and PIGOTT, BB., WILLES, KEATING, and MONTAGUE SMITH, JJ., concurred.

*Judgment affirmed.*

Attorneys for plaintiff: *Emmet & Son.*

Attorneys for defendants: *Ridsdale & Craddock.*

1866
*Feb.* 10.

ASH, Appellant; LYNN, Respondent.

*Licensed Victuallers—Beer Act*, 35 *Geo.* 3, *c.* 113, *s.* 1—*Excise Act*, 6 *Geo.* 4, *c.* 81, *s.* 11.

The Excise Act, 6 Geo. 4, c. 81, s. 11,—which enacts that nothing herein contained shall extend to prohibit any person duly licensed to sell beer, cyder, or perry, by retail, to carry on his trade, for which he is licensed, in booths or other places, at the time and place and within the limits of any lawful fair or any public races,—does not dispense with the necessity of a magistrates' licence, and any person selling beer at a race without such licence, is liable to the penalty imposed by 35 Geo. 3, c. 113, s. 1.

*Quære*, whether a regatta is a race within the meaning of the above 11th section.

Case stated by justices of the borough of Devonport under the 20 & 21 Vict. c. 43.

The appellant was convicted under the 35 Geo. 3, c. 113, of having on the 2nd of August, 1865, sold beer at a place in England called Richmond Walk in the said borough without being duly licensed so to do.

Upon the hearing the following were found as facts:—The defendant sold beer on the 2nd of August, 1865, in a booth or tent at a place called Richmond Walk, in the said borough of Devonport. He was a licensed victualler of the borough of Plymouth (an adjoining borough to Devonport), having the usual excise and magistrates' licences to sell beer at his victualling-house there under the General Licensing Act (9 Geo. 4, c. 61), and he held no other licence. The said sale of beer took place on the occasion of a public regatta for boats in the harbour of Hamoaze, which is an estuary of the river Tamar, and the sale took place in a booth or tent in the courtyard of a dwelling-house abutting on the harbour in which harbour such public regatta was held.

The 35 Geo. 3, c. 113, s. 1, enacts "that if any person shall sell by retail or shall permit ale or beer or any other exciseable liquors to be sold by retail in his house, outhouse, yard, garden, orchard, or other places, without being duly licensed so to do," every such person on conviction shall forfeit 20*l*. Section 17 provides "that nothing in this act shall extend to prohibit any

person from selling ale or beer in booths or other places at the time and place of holding any lawful and accustomed fair."

The 6 Geo. 4, c. 81, s. 1, imposes a duty "on every person who shall be duly authorized by justices to keep a common inn, ale-house, or victualling-house, and who shall sell beer, cyder, or perry, by retail, to be drank in his house or premises." Section 11 enacts "that nothing herein contained shall extend to prohibit any person duly licensed to sell beer, cyder, or perry, by retail, to be drank or consumed in his house or premises . . . to carry on his trade or business for which he shall be licensed, in booths, tents, or other places, at the time and place and within the limits of holding any lawful and authorized fair, by virtue of any law or statute in that behalf, or any public races."

The appellant claims to be exempt from the penalty referred to in the 35 Geo. 3, c. 113, on the ground that he comes within the exemption of the 11th section of 6 Geo. 4, c. 81, this sale having taken place in a booth, and at a place, as he contends, within the limits of public races, or where a public race was being held.

The justices were of opinion that the 6 Geo. 4, c. 81, is an excise act, the 11th section of which does not apply to the offence in question, such offence not being contained in that act of 6 Geo. 4, but being an offence under a separate and independent and subsisting statute, namely, the 35 Geo. 3, c. 113, which is not an excise act, but a statute for police purposes, as appears to be illustrated in the cases of *Rex* v. *Hanson* (1); *Rex* v. *Drake* (2); and *Buckle* v. *Wrightson.* (3)

Further, that should the 6 Geo. 4, c. 81, apply to the offence laid under the 35 Geo. 3, the appellant is still not within the exemption of the 11th section of the 6 Geo. 4 upon two grounds, namely, 1st, because a regatta is not a public race within the meaning of the 6 Geo. 4, c. 81; and, 2ndly, because the place of sale being on the land, although abutting on the water where the regatta was held, was not "within the limits of the place" where such regatta was held.

The questions for the opinion of the Court were:—

1st. Whether the 11th section of 6 Geo. 4, c. 81, has any opera-

(1) 4 B. & A. 519. (2) 6 M. & S. 116.
(3) 34 L. J. (M. C.) 43.

1866

ASH v. LYNN.

tion or force except in relation to the offences referred to in that statute and therein contained.

2nd. Whether the 35 Geo. 3, c. 113, be not independent of the 6 Geo. 4, c. 81, and still in force; and therefore whether the exemption from penalties under it is not confined as stated in the 7th section of the said 35 Geo. 3, c. 113, to fairs only.

3rd. Whether if the 35 Geo. 3, c. 113, be inoperative and controlled by the 11th section of the 6 Geo. 4, c. 81, then whether a regatta can be legally deemed to be a "public race" within the meaning of 6 Geo. 4, c. 81; and, if so—

4th. Whether the sale of beer having taken place at a booth in a courtyard of a dwelling-house abutting on the said harbour of Hamoaze, where the boats raced, such sale can be said to have been made at a place within the limits of the holding of the said so-called race.

*T. J. Clark*, for the respondent. The conviction was right. The 35 Geo. 3, c. 113, s. 1, imposes a penalty of 20*l.* on any person selling beer by retail without a magistrates' licence, and section 17 only excepts the sale at fairs, and does not include races. The 6 Geo. 4, c. 81, s. 11, is relied on by the appellant as giving him an exemption; but that is an excise act, whereas the 35 Geo. 3, c. 113, is a police act: *Rex* v. *Hanson.* (1) The licence of justices is still necessary, notwithstanding the necessity also of an excise licence: *Rex* v. *Drake.* (2) If there were any doubt about the matter, it is removed by the words of section 11, which are that nothing *herein* contained shall extend to prohibit a person duly licensed from carrying on his trade in booths, &c. Secondly, a regatta is not a public race within the exception, nor was the sale within the limits of the place where the race was.

*Lopes*, for the appellant. The exemption as to races in section 11 of 6 Geo. 4, c. 81, was repealed by 25 & 26 Vict. c. 22, s. 12, but was re-enacted by 26 & 27 Vict. c. 33, s. 21. "Duly licensed" in that section does not mean duly licensed by magistrates, but having an excise licence. That the appellant had, and therefore he comes within the exemption. No justices' licence could be granted for this particular spot of ground. All that *Rex* v. *Han-*

(1) 4 B. & A. 519. (2) 6 M. & S. 116.

1866

ASH v. LYNN.

*son* (1) decided was, that clauses in the 48 Geo. 3, c. 143, had no reference to the 35 Geo. 3, c. 113, and that the appeal given by the latter act therefore did not extend to convictions under the former. [He also argued that a regatta was a public race, and the place within the limits of the race.]

BLACKBURN, J. Without expressing any opinion on the other points, I think that the conviction must be affirmed on the first ground taken by the magistrates. The 35 Geo. 3, c. 113, s. 1, imposes a penalty on any person selling ale, beer, or other exciseable liquors without being duly licensed by the magistrates. But that act, as Lord Tenterden points out in *Rex* v. *Hanson* (1), is not an excise act. Its object was regulations of police. If, therefore, a person sells ale without the magistrates' licence, he sells it subject to the penalty of 20*l.* provided by that act. The 6 Geo. 4, c. 81, s. 2, is an excise act, and imposes a duty on every person duly licensed by justices as a victualler who sells beer by retail; and section 11 says that nothing in that act shall extend to prohibit any person duly licensed to sell beer by retail to carry on his trade for which he is licensed in booths, tents, or other places, at the time and place and within the limits of holding any lawful fair, or any public races. But it is far from saying he may sell without licence at all; therefore a magistrates' licence was required by the appellant, even assuming him to have been within the exception. Now, the appellant had a magistrates' licence for Plymouth, but not for Devonport; therefore he was rightly convicted.

MELLOR, J., concurred.

*Conviction affirmed.*

Attorneys for appellant: *Poole & Gamlin.*

Attorneys for respondent: *Clowes & Hickley.*

(1) 4 B. & A. 519.

1865
*Nov.* 16.*

## Ex parte O'DONNELL.

*Friendly Society—Proceedings against Assignee of Officer*—18 & 19 *Vict. c.* 63, *s.* 24.

An officer of a friendly society, being indebted to the society for moneys received on their behalf, resigned his office and made an assignment for the benefit of his creditors. The assignee received from the estate more than the balance due to the society, but refused to pay it over. No specific money belonging to the society was proved to have come to the hands of the assignee :—

*Held*, that the assignee was not liable to be proceeded against before justices under s. 24 of the 18 & 19 Vict. c. 63.

John Jones was up to 20th December, 1864, treasurer to the Liverpool Minerva Lodge of Odd Fellows, a duly certified friendly society. On that day he resigned his office, being then indebted to the society in 73*l.* for moneys received on behalf of the society. In January, 1865, the 73*l.* being still unpaid, Jones executed an assignment for the benefit of creditors to two trustees, of whom one Isaac Storey is the survivor. Storey had received more than 73*l.* out of Jones's estate, but had not paid any of it to the society, although he received notice to do so, under s. 23 of 18 & 19 Vict. c. 63. An information was then laid under section 24 (1) against

* Decided in Mich. Term, 1865.

(1) 18 & 19 Vict. c. 63, s. 23. "If any person already appointed or employed, or hereafter to be appointed or employed to or in any office in any friendly society . . . . and having in his hands or possession, by virtue of his office, any moneys or property whatsoever of such society, or any deeds or securities belonging to such society, shall die or become bankrupt or insolvent, or have any execution or attachment or other process issued against him, or any part of his property, or shall have any action or diligence raised against his lands, goods, and chattels, or effects, or property, or other estate, heritable or moveable, or shall make any assignment, disposition, assignation, or other conveyance for the benefit of his creditors, the heirs, executors, administrators, or assignees of every such officer, and every other person having or claiming a right to the property of such officer, and the sheriff or other person executing such process, and the party using such action or diligence respectively, shall, upon demand in writing made by the treasurer, or by the trustee, or any two of the trustees of such society, or any person appointed at some meeting of the society, to make such demand, deliver, and pay over all such moneys, property, deeds, and securities belonging to such society, to such person as such treasurer or trustees shall appoint, and

1866

*Ex parte* O'DONNELL.

Storey, by Hugh O'Donnell, the present treasurer, on behalf of the society, charging Storey with having, as assignee of Jones, money in his possession belonging to the society, and withholding it. A summons was granted, and the information came on for hearing before the sitting justices of the borough of Liverpool, but they declined to adjudicate, on the ground that they had no jurisdiction, as Storey was not shewn to have received any specific money belonging to the society.

*Holker* moved, on behalf of O'Donnell, on affidavits disclosing the above facts, for a rule calling on the justices to shew cause why they should not hear and determine the information against Storey.

The justices declined jurisdiction on the ground that the money was not identified. They have arrived at an erroneous decision.

shall pay out of the estate, assets, or effects, heritable or moveable, of such officer, all sums of money due which such officer shall have received before any other of his debts are paid, and before any other claims upon him shall be satisfied, and before the money directed to be levied by such process, or which may be recovered or recoverable under such diligence, is paid over to the party issuing such process, or using such diligence; and all such assets, lands, goods, chattels, property, estates, and effects, shall be bound to the payment, discharge, and satisfaction of such claims."

Sec. 24. "If any officer, member, or other person, being or representing himself to be a member of such society, or the nominee, executor, administrator, or assignee of a member thereof, or any person whatsoever, by false representation or imposition, shall obtain possession of any moneys, securities, books, papers, or other effects of such society, or having the same in his possession shall withhold or misapply the same, or shall wilfully apply any part of the same to purposes other than those expressed or directed in the rules of such society, or any part thereof, it shall be lawful for any justice acting in the county or borough in which the place of business of such society shall be situated, upon complaint made by any person on behalf of such society, to summon the person against whom such complaint is made, to appear at a time and place to be named in such summons, and any two justices present at the time and place mentioned in such summons shall proceed to hear and determine the said complaint in manner directed by the 11 & 12 Vict. c. 43 . . . . and if the justices shall determine the complaint to be proved against such person, they shall adjudge and order him to deliver up all such moneys, securities, books, papers, and other effects to the society, or to repay the amount of money applied improperly, and to pay, if they think fit, a further sum of money not exceeding 20*l.*, together with costs not exceeding 20*s.*, and in default of such delivery of effects or repayment of such amount of money, or payment of such penalty and costs, the justices may order the person so convicted to be imprisoned in the common gaol or house of correction, with or without hard labour, for any time not exceeding three months."

1866

*Ex parte* O'Donnell.

Section 23 gives to a friendly society priority over other creditors of an officer, and section 24, which is co-extensive with section 23, enables the justices to deal summarily with the accounts of the officer, enumerated in that section.

[Mellor, J. The distinction between the two sections is, that section 23 applies to money which comes into the hands of the officer in a legitimate manner, and section 24 to cases in which the officer has obtained money by false pretences, or where he has specific money of the society in his hands which he withholds or misapplies.]

Section 24 contemplates both cases, that is, where the officer has obtained money by false pretences and also where he has received money of the society and does not pay it over.

[Shee, J. Section 24 enacts that in default of the payment of the money the person convicted before the magistrates shall be imprisoned for any time not exceeding three months. If your construction is correct, the trustee of the officer, in default of payment, can be imprisoned with hard labour.]

Section 24 is not limited to specific money received by the officer, because the order which the justices are to make is to deliver up the money, or if they have paid the debts of the assignor with it, then the justices have power to order the trustees to repay the money which has been improperly applied.

Mellor, J. I think there ought to be no rule. The justices were right. The facts shew that the case is not within section 24. This is clear from that part of the section containing the penalty; as my Brother Shee pointed out, that section cannot apply to assignees who innocently, and it may be properly, receive money, but only to those cases where a person by his own act improperly obtains money, or, having it in his possession, refuses to give it up, then he is subject to all the penalties mentioned in that section. There is no evidence of the assignee having any money of the society.

Shee, J. I think section 24 only applies to cases where specific money is in the possession of the trustees. If persons withhold any moneys, securities, books, papers, or other effects of a society, then they would be punishable in the manner pointed out by that section.

1866

*Ex parte* O'DONNELL.

LUSH, J. I am of the same opinion. This application is in effect to compel the assignee to pay a debt in priority of the other creditors; but the application to the justices under section 24 can only be made where there is specific money shewn to belong to the society in the hands of the officer or his assignee.

*Rule refused.*

Attorney for applicant: *Thomas Price.*

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*Feb.* 10.

LUNT *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

*Railway Company—Level Crossing—Railways Clauses Consolidation Act,* 1845 (8 *Vict. c.* 20), *s.* 47—*Negligence.*

The defendants' line of railway was crossed by a public carriage road diagonally on a level, and there was also at the same spot crossing the railway nearly at right angles a private way leading to C.'s storeyard. There was a gate on C.'s side of the railway opening into his yard, which was a private gate under C.'s control, but nearly immediately opposite, on the other side of the railway, there was one gate across both the private way and the public carriage road, and this gate was under the control of the defendants, there being a gatekeeper stationed there by them, pursuant to section 47 of the Railways Clauses Consolidation Act. Any one going with a carriage, &c., to C.'s yard passed through this gate across the railway and in at the private gate opposite, and vice versâ on leaving the yard. The plaintiff's carman with his cart and horses having unloaded in C.'s yard one evening after dark, was about to leave, and having opened C.'s gate, the gate opposite being nearly closed, hailed the defendants' gatekeeper on the opposite side of the railway to know if the line was clear, and he answered "Yes, come on." The cart and horses accordingly proceeded, and were run into by a train:—

*Held*, that though section 47 in terms imposed the duty on a railway company of merely keeping "the gates closed across a public carriage road, except when carriages, &c., shall have to cross the railway," yet the duty was implied of using proper caution in opening them; that, whatever might have been the consequence had the way which the plaintiff's carman was using been simply the private way, as he could not get across the railway without passing through the public gate, it was the gatekeeper's duty to open or refuse to open it for him; that what the gatekeeper said was equivalent to opening the gate, and he therefore was guilty of negligence in connection with his duty for which the defendants were liable.

FIRST count. That the plaintiff was possessed of a certain cart or lurry, and two horses, and the defendants were possessed of a certain line of railway, which crosses at a level a certain public

1866

LUNT v. LONDON AND NORTH WESTERN RAILWAY CO.

road. That the defendants were in the habit of driving and running, by their servants, divers engines, tenders, and trains along the railway and across the road, and it became and was the duty of the defendants to put and place proper and sufficient gates at the crossing, and to keep the gates properly ordered and regulated, and to keep and maintain at the crossing proper and efficient officers and servants for the safety and protection of persons lawfully using the road. That the plaintiff's cart and horses were lawfully and properly using the road, and were being lawfully and properly driven across the railway at the crossing, yet the defendants wholly failed to put and place at the crossing proper or sufficient gates, or to keep such gates properly ordered or regulated, and wholly failed to keep and maintain at the crossing proper or efficient officers or servants; and the defendants maintained and kept the crossing so negligently and improperly unprotected by gates, and provided such improper, inefficient, and incapable officers and servants at the crossing, and so negligently and improperly conducted themselves in and about the premises, and so negligently and carelessly, and improperly drove a certain locomotive engine, tender, and train of carriages attached thereto, over and across the road at the crossing, that while the plaintiff's cart and horses were so lawfully and properly using the road, and were so being lawfully and properly driven across the railway at the crossing as aforesaid, the engine, tender, and train, struck, knocked down, and upset the plaintiff's cart and horses, whereby the cart was crushed and broken, and rendered altogether useless to the plaintiff, and one of the horses was killed, and the other was so injured that it became necessary to put it to death, and it was accordingly put to death. And the plaintiff was by the premises otherwise injured and damnified.

Second count. That the defendants were possessed of a certain line of railway, and so negligently and unskilfully managed the railway, and the engines and carriages passing along and upon the railway, and were guilty of such negligent and unskilful conduct in that behalf, that a certain engine and train of carriages then upon the railway was driven violently into collision with a certain lurry and horses of the plaintiff then lawfully and properly crossing the railway, whereby the lurry and horses were knocked

down and upset, and the lurry was broken and destroyed, and the horses wounded and injured so as to become useless, and the plaintiff suffered other damage, as in the first count mentioned.

Pleas. 1st. Not guilty. 2nd. To the first count, that the plaintiff's cart and horses were not lawfully and properly using the road, and were not being lawfully and properly driven across the railway at the crossing as alleged. 3rd. To the second count, that the lurry and horses were not lawfully and properly crossing the railway, as alleged.

Issue thereon.

The cause was tried before Montague Smith, J., at the Liverpool Summer Assizes, 1865. A line of railway of the defendants between Warrington and Garston, at Bank Quay, on the banks of the Mersey, crosses a public carriage road diagonally on a level, and there is about the same spot, crossing the line nearly at right angles, a private way leading to Messrs. Crossfield's storeyard. There is a gate on Crossfield's side of the railway opening into their yard, which is a private gate under the control of Crossfield. Nearly immediately opposite on the other side of the railway, there is one gate across both Crossfield's private way and the public carriage way, and this gate is under the control of the defendants, there being a gatekeeper stationed there by them, pursuant to s. 47 of the Railways Clauses Consolidation Act, 1845. Any one going with a carriage, &c., to Crossfield's yard, passes through the public gate, across the railway, bearing slightly to the left, and in at the private gate nearly opposite, and vice versâ on going from the yard; while any one intending to pass along the public way enters at the same public gate, crosses the railway diagonally, bearing to the right, and out at another public gate lower down on Crossfield's side of the railway, and vice versâ if going the other way.

The plaintiff's carman, with his lurry and two horses, having unloaded in Crossfield's yard, on the evening of 23rd of November, after five o'clock, was about to leave, and having opened Crossfield's gate, the opposite gate being nearly shut, hailed the defendant's gatekeeper Martin Magrath on the opposite side of the railway, to know whether the line was clear, and Magrath, as the plaintiff's witnesses alleged, said "Yes, come on." The cart and

1866

LUNT v. LONDON AND NORTH WESTERN RAILWAY CO.

horses accordingly proceeded, but had scarcely got on to the line when a passenger train came up, and ran into them, and killed one horse and greatly damaged the other, and broke the cart to pieces. The defendants' witnesses maintained that Magrath was calling to the driver of a luggage train to go on and not in answer to the plaintiff's carman.

The learned Judge left it to the jury to say, whether Magrath was guilty of negligence which caused the accident, or whether it was caused by the plaintiff's carman going across without proper caution. The jury returned a verdict for the plaintiff for the agreed sum of 100*l.*, leave being reserved to the defendants to move to enter a verdict or nonsuit, if the Court should be of opinion that there was no evidence to charge the defendants with negligence.

A rule nisi was obtained accordingly, and also for a new trial, on the ground that the verdict was against the weight of evidence.

*Mellish, Q.C.*, and *Pope* (Feb. 9), shewed cause. Assuming the verdict of the jury right on the facts, the negligence of which Magrath was guilty was so connected with his duty as gatekeeper and the defendants' duty at a level crossing as to make them liable for his negligence. The gatekeeper is placed there for the very purpose of protecting passengers by only opening the gates when it is safe to pass, and if he opens them incautiously, or does what is the same thing, invites the passenger to come across when it is dangerous to do so, his employers are answerable for his negligence. *Stapley* v. *London, Brighton, and South Coast Railway Company* (1) is directly in point for the plaintiff; and *Stubley* v. *London and North Western Railway Company* (2) is no authority the other way. [They also contended that the verdict was not against the weight of evidence.]

*E. James, Q.C.*, *Aspinall, Q.C.*, and *Macrory* (Feb. 9, & 10), in support of the rule. The only duty imposed on a railway company with regard to gates is that imposed by s. 47 of the Railways Clauses Consolidation Act, which enacts "that if the railway cross a public carriage road on a level, the company shall erect and maintain sufficient gates across such road on each side of

(1) Law Rep. 1 Ex. 21. (2) Law Rep. 1 Ex. 13.

the railway, and shall employ proper persons to open and shut the gates; and such gates shall be kept constantly closed across the road on both sides of the railway, except during the time horses and carriages, &c., shall have to cross the railway . . . and the person entrusted with the care of the gates shall cause them to be closed as soon as such horses, carriages, &c., shall have passed through." In the present case the defendants' gates were closed, or at least not open: so that, even assuming the plaintiff's man were in the same position as if he were using the public road, there was no breach of the statutable duty; and Magrath cannot be made the agent of the defendants to say what the jury have found he said. But the plaintiff's carman was using the private way, and the gate was under the control of Crossfield's people, s. 68 only requiring the erection of gates; and as to private ways or even public footpaths there is no duty imposed on the company of taking care of the passengers: *Stubley* v. *London and North Western Railway Company*. (1) The fact of this being a private way distinguishes the case from *Stapley* v. *London, Brighton, and South Coast Railway Company* (2), for that was a public road, which of course must include a public footpath. Moreover, in that case the gates were left open, which was a direct breach of the statutable duty; and that case was based very much on the authority of *Bilbee* v. *London, Brighton, and South Coast Railway Company* (3), in which the Court of Common Pleas proceeded expressly on the peculiarly dangerous circumstances of the crossing. [They also contended that the verdict was against the weight of evidence.]

BLACKBURN, J. I am of opinion that the rule must be discharged on both points. The question of fact is whether the accident was attributable to Magrath's negligence, or whether the plaintiff's carman contributed to it by his want of caution. As to this it is sufficient to say that when a second jury have affirmed a previous verdict (4), the Court never interferes except in a very strong case, almost amounting to the miscarriage of justice, and I see nothing of that kind in the present case. The other

(1) Law Rep. 1 Ex. 13.
(2) Law Rep. 1 Ex. 21.
(3) 34 L. J. (C.P.) 182; 18 C. B. (N.S.) 584.
(4) There had been a previous trial before Shee, J., and verdict for the plaintiff, and a new trial granted as against evidence.

1866

LUNT v. LONDON AND NORTH WESTERN RAILWAY CO.

question arises on the leave reserved,—and is one well worthy of consideration, though I believe we have all now come to a clear opinion upon it,—whether the negligence found by the jury on the part of Magrath was negligence within the scope of his duty as a servant to the company, so as to make them responsible for it. It appears that the railway is made across a public road diagonally on a level, and the access to Crossfield's yard being also cut off, there is a private way nearly straight across the railway at the same spot to Crossfield's storeyard, the private way and the public road blending somewhere, it is difficult to say exactly at what point, upon the line of rails. As to private roads, s. 68 of the Railways Clauses Consolidation Act, 1845, regulates the railway company's duty, which is simply to make proper fences and gates, and the gates on each side of the railway are left in the control of the private owner, on whom is imposed the duty of keeping the gates locked, and he has, no doubt, to look after them. But where the railway crosses a public carriage road on a level, s. 47 enacts "that the company shall erect and maintain sufficient gates across the road on each side of the railway, where the same shall communicate therewith, and shall employ proper persons to open and shut the gates, and the gates shall be kept constantly closed across the road on both sides of the railway, except during the time when horses, carriages, &c., passing along the same shall have to cross the railway." The act does not say in words that the "proper persons" having the care of the gates are to see that the railway is reasonably safe for passing when they open the gates, and it does not say that these "proper persons" are to exercise a discretion and not to open the gates when it is dangerous to cross the railway, and keep them shut until the line is clear and it is safe for the carriage, &c., to pass; but the enactment obviously means that. I think the construction of the section can only be, that the "proper persons" are to exercise reasonable caution and look to the line and see that it is clear, and open the gates when they see it is clear, and not otherwise. In *Stapley* v. *London, Brighton, and South Coast Railway Company* (1), the company had very properly made regulations for the guidance of their servants, by which they directed that their gatekeepers

(1) Law Rep. 1 Ex. 21.

should exercise this discretion and caution, and look along the line and satisfy themselves that no train or engine is in sight. I think they were bound to do this in some way or other: but whether the railway company gave this express direction or not to their servants, I cannot doubt that where a railway crosses a public road on a level, the company by their servants in charge are bound not to allow the gates to be open and the railway crossed except at times when it is reasonably safe to do so. In the present case, in point of fact, on Crossfield's side of the railway, the yard opens through a private gate on to the railway, and further down on the same side there is also a public gate for the public road, but owing to the peculiar way in which the two roads cross the line, on the other side,—instead of a single gate for Crossfield's occupation way, and another in the company's own control for the public road, which there would be if the two roads were further apart,—there is but one gate for both public and private use. The defendants therefore have chosen, or it may be have been obliged, to make one gate across both ways (though I doubt the obligation, but I agree there was no necessity to do otherwise); and this gate was under the custody of Magrath. And when the company, either voluntarily or because from the position of their works they could not avoid it, have one gate under their control, by their servant, who is to open and shut that gate and let people through, it certainly seems to me that he ought as far as that gate is concerned to exercise some discretion and care as to whether the line is safe to pass, before he allows people to go through that gate to cross the railway, whether the passenger were going through the gate in order to pass along the public way or to Crossfield's.

In the present case the matter is a little complicated, but I think not altered in principle, by the fact that the passenger was going the other way, viz., from Crossfield's. The plaintiff's man was in Crossfield's yard, and he came to Crossfield's gate, and the position of the two roads was such that he could not cross the rails unless the public gate which was under the control of the company was open. If that gate had been kept closed, he must have waited until it was opened, for if he had driven across the railway without it being open it would have been highly dangerous. I think, therefore, that when he came to Crossfield's gate it

1866

LUNT v. LONDON AND NORTH WESTERN RAILWAY CO.

was not only perfectly right and proper, but absolutely necessary, to call to the other side to the company's man to open the company's gate, which they had the control of, in order that it might be possible for him to pass. He did not do that merely, but he called out to Magrath to know whether the line was clear, and, according to the plaintiff's evidence, which the jury believed, Magrath answered, "Yes; come along." If that was so, and Magrath was in such circumstances that he might reasonably know that the line was not clear and safe, there could be no doubt that Magrath personally was guilty of great negligence. If the fact was as the defendants' case supposed, that Magrath did not hear or answer that inquiry at all, Magrath was guilty of no negligence at all. That is a question of fact; but if Magrath, having the custody of the gate, and being bound to open the gate when the line was safe, and not to open the gate when the line was not safe, was asked in substance, "Is the line clear? If so, open the gate for me," for that is what in substance the inquiry is, and answered, "Come along," it seems to me that he was acting strictly upon what the company had set him to do, to open the gate when the line was safe, and thereby ask people to come across, and not to open it when it was not safe; and that he did, in the exercise of his duty towards the company, invite a man to come across at a time when it was dangerous to do so, it being the very essence of his duty to open the gate only when it was not dangerous.

This case, therefore, seems to me, to be stronger against the defendants than the case of *Stapley* v. *London, Brighton, and South Coast Railway Company*. (1) In that case the facts were, that a public carriage road crossed the railway on a level, and there was alongside of the road a public footway, as is almost universally the case. The company's obligation is only with regard to a public carriage road, to put gates across it, so that horses, cattle, and carriages cannot go upon the line; but the statute impliedly directs what the company in fact had done, that there should still be a turnstile so as to allow foot passengers to pass, foot passengers being entrusted to look out for themselves. But in that particular case the man whose duty it was to open and

(1) Law Rep. 1 Ex. 21.

shut the gates, and whose duty it was to be on the spot to give warning and directions as to carriages and horses, was absent, and had left the carriage gate open. The gatekeeper was placed there for this particular duty of opening and shutting the gate, and although the person about to cross was a foot passenger to whom he had no such duty, and for whom, if there, he would not have been bound either to open or shut the gate, nevertheless the Court of Exchequer held, that the passenger seeing the gate was open might reasonably think that this was an invitation to carriage passengers, and therefore that he also had a right to assume that all was safe and go on; and that consequently on an injury occurring to him from the passing of a train, there was evidence of negligence on the part of the company. The present case is much stronger, because the only gate that could be used by the plaintiff's man was the gate placed by the company for the public traffic, and what the gatekeeper did was much more clearly and plainly within the scope of the duty of the company towards the passenger who was going to pass through the gate, and who could not get from across the line at all unless the man in charge opened the gate. I think, therefore, there was evidence to go to the jury upon this point, and that it was properly left to them, and we cannot enter a verdict for the defendants.

I wish to guard myself from all chance of being understood to lay down a broader principle than I really intend. I do not think the present case requires us to decide, or to express any opinion, as to what would have been the consequence, had the occupation way been only near, and crossed the line a little way from Magrath's station, and not passed through his gate. It would have been his duty, as a humane and rational man, to have called out, if he saw there was danger; but I do not wish to be understood as saying, that though it might have been the duty of the gatekeeper, his not doing so would be a matter for which the company would be responsible.

MELLOR, J. I am of the same opinion on both points, and I need not add anything as to the new trial. The other point is, was there any misdirection in the judge leaving the question of negligence to the jury when there was really no evidence to

1866

LUNT v. LONDON AND NORTH WESTERN RAILWAY CO.

charge the defendants with negligence? Now, can it be the fact, as has been contended, that the statute imposes on railway companies the naked obligation of opening and shutting the gates? That is what the argument of the counsel for the defendants amounts to; for if we cannot go out of the strict words used, and can make no implication to extend the effect of the words beyond their literal meaning, then if a railway crosses a public carriage road on a level, inasmuch as the gates are to be kept constantly closed across the road except when carriages have to cross the railway, the persons in charge are to open the gates whenever a carriage has to cross, without any regard as to whether it would be the next moment smashed to pieces by an approaching train or get safely across. It is clear that is not the meaning of the statute. The meaning is that the gates are only to be opened for the actual passage of carriages and then only when it is safe for them, and that those in charge of the gate must exercise the discretion of reasonable beings in performing their duty; and in practice there is no doubt about the matter, for everybody in his experience has been stopped in a carriage at a level crossing till the gatekeeper has thought it safe for him to pass through. But it is said further here, whatever may be the rule as to the company's duty with respect to a public carriage road, it is not applicable to a private carriage way, as to which there is no duty imposed by statute; but in the present case we are relieved from that difficulty; here is a gate under the control of the company across both public and private way. Now the defendants were either bound to put this gate across the whole breadth, and if so they are bound to have a gatekeeper in order to keep it properly open and shut; or they were not bound to have one gate and still did put one, and then the duty of the gatekeeper must be the same, whether there be a private road as well as a public road approaching it or not. If then the gatekeeper, as it is clear, must exercise a reasonable discretion in opening the gates, so he ought to exercise the same discretion in saying "Come on" or "Go back." The circumstance of leaving the gates open offered an invitation to the passenger to cross, as Channell, B. said in *Stapley* v. *London, Brighton, & South Coast Railway Company* (1); but if the gate-

(1) Law Rep. 1 Ex. 21.

keeper is there and can speak he may invite by word, and so be guilty of the same negligence. It therefore seems to me that it may be reasonably said that the gatekeeper was guilty of negligence in the exercise of the discretion attaching to his duty as the company's gatekeeper, and so the company were liable for his negligence, which the jury found was the cause of the accident.

LUSH, J. I also agree that the conduct of the gatekeeper Magrath amounted to a breach of duty in the company. The argument for the defendants is based on a literal interpretation of the 47th section of the Railways Clauses Consolidation Act, which enacts, that "if the railway cross any turnpike or public carriage road on a level the company shall erect and at all times maintain good and sufficient gates across such road, on each side of the railway, and shall employ proper persons to open and shut the gates, and the gates shall be kept constantly closed across the road on both sides of the railway, except during the time when horses, carriages, &c., passing along the road shall have to cross the railway." But it is far too narrow a construction to say that the only duty is the mechanical one of opening and shutting the gates; the object of the statute is to protect persons passing the level crossing, whether on the railway or on the road. "Opening and shutting the gates," is merely the express formula. There is implied in it a much larger duty than that which is expressed in the mere words, the duty of taking reasonable care of the passengers' safety. It is said, at all events, the only duty is that imposed by section 47, and there is no duty to foot passengers; and thence is drawn the argument that there is no duty as to persons crossing in the exercise of a private right of way. But can that avail in the present case? The object is to protect passengers passing on the railway or on the road, and can it be said, if it happen that a passenger on horseback and a foot passenger are allowed to pass by one opening of the gates, and both perish on the railway, that the company would be liable for the death of the passenger on horseback, but not for the foot passenger's death? That state of things cannot have been intended by the legislature. If the liability, therefore, attaches as to any person using the public way and going through both public gates, can it make any difference

1866

LUNT v. LONDON AND NORTH WESTERN RAILWAY CO.

if a person go through one public gate only, and when he gets on the railway diverges to the right or left over a private way? Supposing a person coming through the gate to the private road, instead of from thence, I apprehend that such a person would be in exactly the same position as a person going along the highway, and entitled to the same protection; and if he is misled by the opening of the gate, and so invited to traverse the railway, and an accident were to occur, I apprehend the company would be liable. Can it make any difference, as the passengers must go through the same gate, that they happen to be going from the private way, and so across the railway, instead of coming first to the public gate? Before the plaintiff's man entered on the private way across the railway, he had to ascertain whether the passage was clear, and if the gatekeeper open the gate so as to intimate that a carriage may safely pass, as he would do if the person had been coming the other way, the company would be equally liable. Can it again make any difference whether the gatekeeper expresses that the road is safe by opening the gate or by words and gestures? I apprehend none. In either way he invites the person to cross by intimating that the way is safe. That, I take it, is part of his duty, placed there as a "proper person" to guard the railway, and it seems to be therefore clear that the company is liable for this negligent breach of duty in their servant.

I need only say as to the new trial, that although I should have come to a different conclusion, I agree that after two juries have come to the same conclusion, we ought not to send the case back for a third trial.

*Rule discharged.*

Attorneys for plaintiff: *Gregory & Rowcliffes.*
Attorney for defendants: *J. Blenkinsop.*

## CHARLOTTE WINSOR *v.* THE QUEEN.

1866
Jan. 24.

*Criminal Law—Felony—Discharge of Jury, effect of—Second Trial—Writ of Error.*

The record of a conviction for felony shewed, that on the trial of the indictment, the jury being unable to agree, the judge discharged them; that the prisoner was given in charge of another jury at the next assizes, and a verdict of guilty returned, and judgment and sentence passed. On writ of error:—

*Held*, that the judge had a discretion to discharge the jury, which a court of error could not review; that the discharge of the first jury without a verdict was not equivalent to an acquittal; that a second jury process might issue; and that there was no error on the record.

WRIT of error from the general session of gaol delivery for the county of Devon, holden on the 26th of July, 1865, before Willes and Keating, JJ.

The record set forth the commission of oyer and terminer issued to Crompton, J., and Channell, B., for the Lent assizes of 1865. It then alleged the finding of a bill of indictment for the murder of T. E. G. Harris against Charlotte Winsor and Mary Ann Harris; it stated that a capias was issued, that a session of gaol delivery was held on Monday, the 13th of March, 1865, and was adjourned to Tuesday, the 14th of March, and from day to day until Friday, 17th of March, on which day Charlotte Winsor and Mary Ann Harris were arraigned, and pleaded not guilty: it then set out the process to summon, the impannelling, and swearing of the jury, and the giving of the prisoners in charge to them, and then proceeded as follows: "And because after the said trial had been duly proceeded with for and during several hours on the said Friday, the 17th day of March, it manifestly appears to the Court that the trial of the said Charlotte Winsor and Mary Ann Harris cannot be concluded on the said Friday, the 17th day of March, the same trial of the said Charlotte Winsor and Mary Ann Harris, and also the said session of gaol delivery are by the Court here duly adjourned at a late hour until the next Saturday, the 18th day of March, at the Castle of Exeter aforesaid, and the said Charlotte Winsor and Mary Ann Harris are committed to the custody of the said sheriff in the said gaol aforesaid, and the said jurors committed to and kept together in the custody of the said

1866

WINSOR v. THE QUEEN.

sheriff until the said Saturday, the 18th day of March, at which said last mentioned session of gaol delivery holden by adjournment at the Castle of Exeter aforesaid, in and for the said county on the said Saturday, the 18th day of March, before the said justices last above mentioned, and other their fellow justices aforesaid, come as well, the said T. E. Chitty, who prosecutes, for our Lady the Queen as aforesaid, as the said Charlotte Winsor and Mary Ann Harris, and the jurors also come, and the trial of the said Charlotte Winsor and Mary Ann Harris is also proceeded with, and after the case on the part of the Crown and the said prisoners respectively has been duly concluded, the said justices duly proceed to charge, and do charge the jury, and afterwards, and immediately after the conclusion of the said charge of the said justices, the jury having then been kept together for the space of thirty two hours, or thereabouts, during the said trial, do retire from the bar here to consult upon their verdict, to be given upon the premises in the said indictment specified, and afterwards, and after the further space of five hours (that is to say) at five minutes before midnight in the night of the said Saturday, the 18th day of March, and at five minutes before the Lord's day the said jurors returned to the bar here, and being asked by the Court whether they have agreed upon their verdict, they say that they have not agreed, and unanimously declare that after full consideration they are wholly unable to agree, and cannot agree upon any verdict to be given by them in the premises aforesaid; and, therefore, because it manifestly appears to the Court here that the said jurors after five hours deliberation, and such consideration among themselves, have not agreed upon any verdict, and declare that they have been unable to agree, and are unable to agree upon any verdict to be given upon the premises aforesaid, and because all other the business of the said session of gaol delivery is finished and completed, and because the Lord's day is immediately at hand, and because the said justices are required by Her Majesty's letters patent to proceed to, and be in her county of Cornwall on Monday now next ensuing, in the execution of the said letters patent, and because it manifestly appears to the justices here that for the reasons and causes aforesaid it is necessary to discharge the said jury, and the said justices do decide and

adjudge that it is necessary to discharge the said jury, and they do on the ground of such necessity as aforesaid altogether discharge the said jury from giving any verdict upon the premises, and they are accordingly discharged from giving their verdict upon the premises aforesaid; and the said Charlotte Winsor and Mary Ann Harris are by the said justices here forthwith committed to the custody of the sheriff of the said county of Devon, in the common gaol of the same county safely to be kept until they shall be thence delivered in due course of law; and thereupon the sheriff is commanded that he have the bodies of the said Charlotte Winsor and Mary Ann Harris at the next general session of general gaol delivery to answer the premises in the said indictment above specified and charged on them."

The record then stated, that at the next session of gaol delivery held before Willes and Keating, JJ., for the county of Devon, on the 26th of July, 1865, and by adjournments from day to day until the 28th of July, come as well the said Charlotte Winsor and Mary Anne Harris as the said T. E. Chitty, clerk of assize and clerk of the crown for the county of Devon, and then proceeded.

"And the said T. E. Chitty, on behalf of our said Lady the Queen, prays of the Court that the said Charlotte Winsor may be tried upon the said indictment separate and apart from the said Mary Ann Harris, and that the said Mary Ann Harris may be examined and give evidence on behalf of our said Lady the Queen upon the trial of the said Charlotte Winsor for the felony and murder aforesaid. And the Court doth allow the said prayer of the said T. E. Chitty. Therefore let the jury here immediately come before the said justices of our said Lady the Queen, &c., to recognise upon their oath whether the said Charlotte Winsor be guilty of the felony and murder aforesaid in the said indictment above specified and charged on her, or not guilty thereof, because &c. Whereupon the counsel for the said Charlotte Winsor then and there objected, and submitted to the said justices that in consequence of the proceedings so had and taken upon the said indictment or inquisition at the then last Lent assizes hereinbefore stated and set forth, the said Charlotte Winsor could not be legally tried before the said justices, and must be discharged from the said indictment and inquisition, and thereupon the said

1866

WINSOR v. THE QUEEN.

justices overruled the said objection, and ordered that the said trial of the said Charlotte Winsor must proceed."

The record then stated that a jury were impannelled, sworn, and charged upon Charlotte Winsor; that the trial was adjourned to the 29th of July, that the jury found a verdict of guilty of murder against Charlotte Winsor, and that judgment and sentence of death was passed.

The assignment of errors was as follows :—

1. That the indictment and the trials had thereupon, and verdict given, and judgment pronounced, and sentence passed upon the said Charlotte Winsor, are not according to the law of the realm.

2. That on the trial of the said Charlotte Winsor on the 17th and 18th of March, 1865, upon the indictment for the said felony and murder, the jury then and there impannelled, sworn, and charged with the trial and deliverance of the said Charlotte Winsor, were discharged by the said justices before the said jury had agreed upon their verdict, and without the jury giving any verdict.

3. That the jury sworn and charged upon the trial of the said Charlotte Winsor upon the said indictment for the said felony and murder on the 17th and 18th of March, were discharged by the said justices before the said jury had agreed upon their verdict, and from giving any verdict in the premises without the consent and without any motion or request of the said Charlotte Winsor, or of her counsel in her behalf, and without any consent and without any motion or request of the prosecutor, or of counsel in his behalf.

4. That on the trial on the 17th and 18th of March, upon the said indictment for the said felony and murder, the said Charlotte Winsor having put herself upon the country for good or ill, and the case on the part of our Lady the Queen and the said Charlotte Winsor respectively, having been afterwards duly concluded, and the said jury having been duly discharged by the said justices, and no fatality, illness, or misconduct of her the said Charlotte Winsor having occurred, and no fatality, illness, or misconduct of them the said jurors, or of any or either of them having occurred, and no fatality or illness of the said justices or of either of them having occurred, and the said jury not having agreed upon their verdict, the said justices ought not to have discharged the said jury at the time and in manner stated on the record.

5. That the said jurors so sworn and charged upon the trial of the said Charlotte Winsor on the 17th and 18th of March, upon the said indictment for the felony and murder, were not, nor were any or either of them, in anywise incapacitated from agreeing to, and finding and delivering a verdict in accordance with the evidence then and there deposed to on the said trial of Charlotte Winsor, yet the said justices discharged the jurors, and prevented them from agreeing to and finding and delivering any verdict in the premises.

6. That the said justices decided and adjudged that it was necessary to discharge the jury from giving any verdict in the premises aforesaid, whereas no legal cause, reason, or necessity, nor any sufficient cause, reason, or necessity appears upon the record whereby to have authorized the said justices so to decide and adjudge.

7. That the said jury so sworn and charged with the said Charlotte Winsor on the 17th and 18th of March upon her trial for the said felony and murder, having unanimously declared that after full consideration they were wholly unable to agree, and could not agree upon any verdict to be given by them in the premises aforesaid, and the said justices should have directed the said jury to return a verdict of not guilty.

8. That the said jury sworn and charged with the trial and deliverance of the said Charlotte Winsor upon the said indictment for the said felony and murder having unanimously declared that after full consideration they were wholly unable to agree, and could not agree upon any verdict to be given by them in the premises aforesaid, and the said justices having thereupon discharged the said jury, the said Charlotte Winsor was, by the law of the realm, entitled to be, and ought to have been, discharged by the said justices from further prosecution, from further peril, and from further vexation upon the said indictment for the said felony and murder.

9. That the said justices having decided and adjudged that the said jury so sworn and charged with the said Charlotte Winsor upon her trial and deliverance on the 17th and 18th of March, upon the said indictment for the said felony and murder, be discharged of their verdict, the said justices ought also by the law of this realm to have given judgment for the said Charlotte Winsor, that she be thereof acquitted and go thereupon without day.

10. That the said Charlotte Winsor having been duly arraigned upon the said indictment for the said felony and murder before the said justices at the general session of oyer and terminer, and having pleaded "not guilty," and put herself upon the country for good or ill, was wrongfully deprived of a legal right to a verdict and deliverance in accordance with the evidence then and there given for and against her, the said Charlotte Winsor.

11. That the said Charlotte Winsor was wrongfully deprived of her legal right to a continuation and conclusion of her trial upon the said indictment for the said felony and murder at the said general session of oyer and terminer.

12. That the trial and deliverance of the said Charlotte Winsor upon the said indictment for the said felony and murder ought to have been, and could and might have been, continued and concluded before the said justices departed from the said county of Devon, and before they were required by the said letters patent to proceed to and be in the county of Cornwall on the day and in manner stated in the said record, whereas the trial and deliverance of the said Charlotte Winsor was not so continued and concluded.

13. That the said justices adjourned, put off, and postponed the trial of the said Charlotte Winsor from the general session of oyer and terminer on the 18th of March to the then next general session of gaol delivery for the said county, to answer the said indictment for the said felony and murder, whereas the said justices had no power or authority so to adjourn, put off, and postpone the trial of the said Charlotte Winsor, or to require her to answer to the said indictment for the said felony and murder at the then next or any other session of gaol delivery.

14. That the trial of the said Charlotte Winsor at the said general session of oyer and terminer upon the said indictment for the said felony and murder, the proceedings against the said Charlotte Winsor were discontinued, and the prosecutor and witnesses who had come and given evidence against the said Charlotte

1866

WINSOR v. THE QUEEN.

Winsor upon her said trial for the said felony and murder were discharged of their recognizances, and were not, nor were any or either of them bound over in recognizance or otherwise to give evidence against the said Charlotte Winsor at the then next or any other session of gaol delivery.

15. That the life of the said Charlotte Winsor was in peril upon her trial on the 17th and 18th of March for the said felony and murder charged against her in the said indictment, therefore the subsequent trial of the said Charlotte Winsor on the 28th and 29th of July for the same felony and murder charged against her in the said indictment was irregular and illegal.

16. That the trial of the said Charlotte Winsor on the 28th and 29th of July upon the said indictment for the said felony and murder was irregular and illegal, because the said Mary Ann Harris, who was jointly charged with the said Charlotte Winsor upon the said indictment for the said felony and murder, was admitted to give evidence, and gave evidence on the part of Our Lady the Queen, against the said Charlotte Winsor.

17. That the said Mary Ann Harris was admitted by the said justices as an approver on the part of our Lady the Queen, and gave evidence on the part of our said Lady the Queen against the said Charlotte Winsor upon the trial of the said Charlotte Winsor for the said felony and murder, with which the said Charlotte Winsor and Mary Ann Harris were jointly charged in the said indictment, and to which the said Charlotte Winsor and Mary Ann Harris had pleaded "Not guilty," and had jointly put themselves upon the country for good or ill, and after all the evidence for and against the said Charlotte Winsor and Mary Ann Harris had been given, and after the said Charlotte Winsor and Mary Ann Harris had been jointly and severally given in charge to the said jury by the said justices upon the said indictment for the said felony and murder, and after the said jury had retired to their private room to consider of their verdict, and before the said jury had agreed upon their verdict, and whilst the said Mary Ann Harris was still in custody for the said felony and murder charged against her and the said Charlotte Winsor in the said indictment.

18. That the said Mary Ann Harris was admitted as an approver on behalf of our Lady the Queen, and gave evidence against the said Charlotte Winsor, upon the said indictment, after she the said Mary Ann Harris had been given in charge to the said jury upon the said indictment, and although no verdict had been given or recorded either for or against her, the said Mary Ann Harris, and although the said Mary Ann Harris had not been discharged from the said indictment, and although no *nolle prosequi* had been entered on her behalf.

19. That the said Mary Ann Harris having been jointly indicted with the said Charlotte Winsor for the said felony and murder, and the said Mary Ann Harris having pleaded not guilty to the said indictment, and put herself upon the country for good or evil, and stood upon her deliverance, and the said Mary Ann Harris not having been delivered by the said jury, and not having withdrawn her plea of not guilty, and not having been acquitted or found guilty by the said jury of the said felony and murder, but still remaining jointly charged with the said Charlotte Winsor with the said felony and murder, the said Mary Ann Harris was nevertheless admitted to become and became an approver on the part of our Lady the Queen against the said Charlotte Winsor, upon the trial of the said Charlotte Winsor on the 28th and 29th of July.

20. That on the trial of the said Charlotte Winsor on the 28th and 29th of

July upon the said indictment for the said felony and murder, the said jury then and there impannelled were sworn to speak the truth of, and concerning the premises in the said indictment, specified and charged upon the said Charlotte Winsor, whereas the said jury so impannelled as aforesaid should have been sworn to well and truly try and true deliverance make, and true verdict give according to the evidence.

21. That for all and every the reasons aforesaid the trial of the said Charlotte Winsor on the 28th and 29th of July, and all and every the proceedings had thereupon against the said Charlotte Winsor for the said felony and murder, were irregular and illegal.

22. That the indictment and proceedings aforesaid, and the matters therein contained, are not sufficient in law to warrant the said judgment so given against the said Charlotte Winsor, or to convict her of the said felony and murder.

23. That the judgment aforesaid, in the form aforesaid, was given for our Lady the Queen, whereas the judgment by the law of this realm ought to have been given against our said Lady the Queen.

24. That the Court before whom the said Charlotte Winsor was convicted had no authority or jurisdiction at law to try the said Charlotte Winsor upon the said indictment, and that the said Charlotte Winsor prays that the judgment aforesaid for the said errors, and other errors appearing on the record and proceedings aforesaid, may be reversed, annulled, and wholly held for nothing, and that the said Charlotte Winsor may be restored to all things which by reason of the proceedings and judgment aforesaid she has lost.

Joinder in error.

Jan. 23. *Folkard* (*Collins* with him), for the plaintiff in error, contended, first, that the discharge of the jury was wrongful; that the judge had power to discharge only in cases of evident necessity, as the death or illness of a juror; and in cases where the discharge has been for the benefit of the prisoner, and at his instance; here no circumstances of that kind occurred; the jury ought to have been kept in consultation a longer time than five hours, and if they had been, possibly they would have been unanimous; they might have been locked up until the Monday, and refreshments might have been supplied to them; if they did not then agree there was authority for saying that the judge should have taken them to the confines of the county, or even round the circuit, and the verdict could have been taken in a foreign county.

[In the course of this part of the argument he cited the following authorities:—

Co. Lit. 227 b; 3 Inst., 110; 2 Hale's P. C. 294, 295, and 313; 2 Hawk. P. C. c. 47; 4 Bl. Com. 360; 1 Chitty's Cr. Law, 634; 2 Reeve's His. Engl. Law, 267-8; Viner's Abridg. Trial, XI. 4 (21 V. 338); *Rex.* v. *Perkins*, Carth. at p. 465; *Rex.* v. *Ledgingham*,

1866

WINSOR v. THE QUEEN.

1 Ventr. 97; 19 Ass. pl. 6; 41 Ass. pl. 11; Bac. Abridg. Juries, (G.); Doctor and Student, Dial. 2, c. 52, p. 271; *Reg.* v. *Locke*, 3 Cr. and Dix 393; Anon., 1 Salk. 201; 7 Mod. 1; *Rex* v. *Mawbey*, 6 T. R. 619; *Rex* v. *Oxford*, 13 East, at p. 416 note (*b*); *Spong* v. *Hogg*, 2 W. Bl. 802; *Harrison* v. *Harrison*, 9 Price, 89; *Rex* v. *Jeff*, 2 Str. 984; *Whitbread and Fenwick's* case, 7 How. St. Tr., pp. 79, 119, 120, and 315; *Lord Delamere's* case, 11 How. St. Tr. 561; *Rex* v. *Horne Tooke*, 25 How. St. Tr. 128, 129; *Rookwood's* case, 13 How. St. Tr. at pp. 165, 166, 173; *Rex* v. *Keite*, 1 Ld. Raym. 141; *Kinloch's* case, Foster C. C. 16; *Shield's* case, 28 How. St. Tr. 647; *Rex* v. *Kell*, 1 Cr. and Dix 151; *Reg.* v. *Stokes*, 6 C & P. 151; *Rex* v. *Scalbert*, 2 Leach C. C. 620; *Rex* v. *Streek*, 2 C. & P. 413; *Rex* v. *Stevenson*, 2 Leach C. C. 546; *Rex* v. *Edwards*, Russ. & Ry. 224; *Rex* v. *Davison*, 2 F. & F. 250; *St. John* v. *Abbott, Barnes*, 441; *Morris* v. *Davis*, 3 C. & P. 427; *Mansell* v. *Reg.*, D. & B. 375; *Rex* v. *Wade*, 1 Mood. C. C. 86; *Conway and Lynch* v. *Reg.*, 7 Ir. L. Rep. 149.]

Secondly, the verdict could have been taken on the Sunday: *Morris* v. *Davis*, 3 C. & P. 427; Com. Dig. Temps, B. 3; 2 Madox History of the Exchequer.

[BLACKBURN, J., referred to Co. Litt. 135 a, as to what are *dies juridici*.]

Thirdly, though the judge may discharge a jury in a case of misdemeanour, if they do not agree, he has no power to discharge them in a case of felony: *Rex* v. *Cobbett*, 3 Burn's Just. Jurors, 974; *Reg.* v. *Leary and Cole*, 3 Cr. & Dix 212; *Reg.* v. *Leckin*, 3 Cr. & Dix 174; *Conway and Lynch* v. *Reg.*, 7 Ir. L. Rep. 149; *Reg.* v. *Davison*, 2 F. & F. 250; *Reg.* v. *Newton*, 13 Q. B. 716; *Reg.* v. *Charlesworth*, 1 B. & S. 460; 31 L. J. (M. C.) 25.

Fourthly, if the judge had a discretion, the Court of Error can review his mode of exercising it: *Rex* v. *Edmunds*, 3 Camp. 207; *Conway and Lynch* v. *Reg.*, 7 Ir. L. Rep. 149; *Rex* v. *Wade*, 1 Mood. C.C. 86.

Fifthly, the second trial was illegal, because the prisoner could not be put upon her trial a second time: *Rex* v. *Emden*, 9 East 437; *Rex* v. *Sheen*, 2 C. & P. 634; *Reg.* v. *Drury*, 18 L. J. (M. C.) 189; *Campbell* v. *Reg.*, 11 Q. B. 838, 839; *Reg.* v. *Green*, D. & B. 113.

1866

WINSOR v. THE QUEEN.

Lastly, the evidence of Harris was improperly admitted; before it could be received either a verdict of not guilty ought to have been taken, or she should have pleaded guilty, and sentence also should have been passed: *Rex* v. *Jackson*, 6 Cox, C. C. 525; *Rex* v. *Stewart*, 1 Cox, C. C. 174; *Rex.* v. *Archer*, 3 Cox, C. C. 228; *Rex* v. *O'Donnell*, 7 Cox, C. C. 337; *Rowland's* case, Ry. & Mood. 401; *Rex* v. *Owen*, 9 C. & P. 83; *Child* v. *Chamberlain*, 6 C. & P. 213; Russ. Cr. vol 3, p. 626 (note); Stark. Evid. pp. 28 and 29; 16 & 17 Vict. c. 99.

Jan. 24. *The Solicitor General* (*Sir R. P. Collier*), (*Hannen* with him), for the Crown. First, the judge, in determining under all the circumstances of the case, whether it was necessary to discharge the jury, determined a question of fact, which he was competent to decide, and which decision cannot be reviewed by writ of error. Secondly, if it be for the Court to decide whether the judge had properly determined the question, his decision was right. Thirdly, if the judge was wrong in discharging the jury, still such wrongful discharge would be no defence at law to a second trial. In considering the first point, it may be as well to refer to the cases in which a jury may be lawfully discharged. A passage is cited by the other side from Co. Litt. 227 b., that "a jury sworn and charged in case of life or member cannot be discharged by the Court or any other, but they ought to give a verdict:" and a similar passage is cited from the 3rd Inst. 110. If that is to be treated as a statement of positive law, it is clear it is imperfectly stated, because in cases of evident necessity the jury may be discharged; if, on the other hand, it is to be treated as laying down a rule of practice, then certainly it is not in accordance with the practice of modern times; and it is extremely doubtful whether it be in accordance with the practice of Coke's own time. A different exposition of the law is given in Doctor and Student, Dial. 2, cap. 52: "If the jury can in nowise agree in their verdict, and that appeareth to the justices by examination, the justices may in that case suffer them to have both meat and drink for a time, to see whether they will agree; and if they will in nowise agree, I think that the justices may make such order in the matter as shall seem to them by their discretion to stand with reason and conscience, by awarding a new

1866

WINSOR v. THE QUEEN.

inquisition . . . . or otherwise as they may think best in their discretion." It would appear from the concluding part of this passage that a considerable latitude is given to the judge. Then, again, *Mansel's* case (1) is at variance with the doctrine of Coke; there, after an imperfect verdict in a case of felony, the Court awarded a *venire de novo*.

[BLACKBURN, J. In that case the entry on the record states that the jury were discharged by consent of the prisoner.]

At any rate it is inconsistent with the unqualified proposition of Coke. In *Ferrar's* case (2), in an indictment for forgery, it is laid down "resolved by all the justices that although the jury be charged and sworn in the case of a plea of the crown, yet a juror may be drawn, or the jury dismissed, contrary to common tradition which hath been held by many learned in the law," clearly shewing that an erroneous impression, possibly produced by Lord Coke's dictum, then prevailed. So again in 2 Hale's P.C. 294-295, it is stated, "if the jury had been once particularly charged with a prisoner, as before instanced, it was commonly held that they must give their verdict and cannot be discharged before their verdict is given, yet if it appears to the Court that some of the evidence is kept back, and that the evidence though not sufficient to convict the prisoner, yet gives the Court a great and strong suspicion of his guilt, the Court may discharge the jury of the prisoner, and remit him to gaol for further evidence, and accordingly it hath been practised on most of the circuits—for otherwise many notorious murders may pass unpunished, by the acquittal of a person probably guilty, when the full evidence is not reached out or given." No doubt the practice of discharging the jury was abused in *Whitbread's* case (3), but still what was done there, tends to shew that such a practice existed. In *Perkins'* case (4), it is reported that Holt, C.J., in a case of perjury tried before him, said "that it was the opinion of the judges of England upon debate between them—1. That in capital cases a juror cannot be withdrawn, though all parties consent to it. 2. That in criminal cases not capital, a juror may be withdrawn if both parties consent, not otherwise. 3. And that in all civil cases a juror

(1) 1 Ander. 103.
(2) Sir T. Raym. at p. 84.
(3) 7 How. St. Tr. 79, 311.
(4) Carthew, at p. 465.

1866

WINSOR v. THE QUEEN

cannot be withdrawn but by consent of all parties." In the opinions of the judges in *Kinloch's* case, as reported in Foster, C. C., p. 27, it is said, "The judges who concurred in this opinion paid very little regard to the resolution reported by Carthew, not only for the reasons insisted on by the counsel for the crown, but because no other printed report of that time taketh any notice of this resolution; it is very doubtful whether there ever was any such resolution or not." *Perkins'* case is cited in *Kinloch's* case, from a Mss. report of Eyre, C.J., but no mention is made in it of this resolution. But coming to more modern times, the practice of discharging juries, when they are unable to agree upon their verdict, has been a uniform and unquestioned practice. No doubt a great many cases, in which this practice has been followed, have not been reported. In *Reg.* v. *Newton* (1), two instances are mentioned, one *Reg.* v. *Jarvis,* where in a trial for murder before Coltman, J. at Coventry, the jury were discharged, and the prisoner was detained till the next assizes, when she was again tried and acquitted. The other is a case mentioned by Lord Denman, C.J., who, when he was Common Sergeant at the Old Bailey, under the sanction of Lord Tenterden, discharged a jury when they were unable to agree. *Shield's* case (2), is directly in point. That case is referred to in the case of *Conway and Lynch* v. *Reg.* (3), and carefully distinguished. In *Shield's* case (2) the rule for discharging the jury, states, "That inasmuch as the jury could not in anywise agree, and that the justices were about to depart from the county, the business having been finished, the jury were ordered to be discharged." The present case is stronger, the record states, in addition to the facts mentioned in *Shield's* case (2), "that the Lord's day was at hand, and the justices were required to proceed and be in the county of Cornwall on Monday next." *Conway and Lynch* v. *Reg.* (3), is no authority for the plaintiff in error, because that case only decided that the mere lapse of a considerable time during which the jury could not agree, would not, in a capital case, justify the judge in discharging them, but all the cases in the Irish courts seem to agree that if the jury are kept until the end of the assizes, they may be discharged. In the

(1) 18 L. J. (M. C.) at p. 202. (2) 28 How, St. Tr. 619—647.
(3) 7 Ir. L. Rep. 149.

1866

WINSOR v. THE QUEEN.

case of *Reg.* v. *Cobbett* (1), in a case of libel Lord Tenterden discharged a jury who had been in confinement fifteen hours. So in *Gray* v. *Reg.* (2), which was a case of felony, the jury were discharged, and the prisoner was tried again. There the jury were discharged three times, first, owing to the illness of a juror; a second time because they would not agree; and also the third time for the same reason. It is true the House of Lords awarded a *venire de novo* on another ground; but still it shews that the practice, when the jury do not agree, is to discharge them, and put the prisoner a second time on his trial; and though the jury in that case were twice discharged, the point was never taken by the very able counsel who appeared for the prisoner. In *Reg.* v. *Davison* (3), Pollock, C.B., states his opinion, "That where a judge has exercised his discretion, that discretion is not to be made the subject of question. It cannot be ground for error, nor can it be traversed and tried before a jury." That was a case of misdemeanour, in which the jury were discharged, and the prisoner was indicted a second time at the Central Criminal Court, and pleaded the discharge of the jury, the Court held the plea bad. Suppose a case, in which the jury were discharged, because a juror was ill, the judge, in the exercise of his discretion, and on the facts before him, thought the juror was ill, and discharged the jury. On the second trial, if a plea stating these facts were pleaded and a traverse taken, the question to be left to the jury would be, whether the juror was, or was not, too ill to proceed with the trial, and if the jury found he was not too ill, it would be very unseemly, if the judge were to hold one way, and the jury another. The observations of the judges in *Reg.* v. *Davison* (3) apply as much to cases of felony as to cases of misdemeanour, and there is the authority of Hill, J., "that the presiding judge at the trial is the sole arbiter of all matters before him, and that his discretion is not in any way to be made the subject of review." Is there any distinction between cases of felony and misdemeanour? It is difficult to see how the fact of the case being one of felony or misdemeanour can affect the discretion of the judge. In the case of a prisoner charged with a felonious wounding the jury may acquit

(1) 3 Burn's Just. tit. Jurors, 974. (2) 11 C. & F. 427.
(3) 2 F. & F. 250—254.

of the felony and find the prisoner guilty of unlawful wounding; has the judge power to discharge the jury when they have acquitted the prisoner of the felony, but are unable to agree on a verdict as to the misdemeanour? The distinction between felony and misdemeanour is in many cases not so marked now as formerly. On an indictment for misdemeanour, if the facts proved should establish a felony, the prisoner may nevertheless be convicted.

Secondly, if the judge can discharge the jury in case of evident necessity, was there in this case "need in a very high degree" to justify him in exercising his discretion? The present Chief Justice of the Common Pleas, then a judge of this court, in the case of *Reg.* v. *Newton* (1), says, "It appears to me that the word "necessity," as affording a rule to guide the judge in the exercise of his discretion as to discharging the jury, does not import an absolute inability to take any other course, but only need in a very high degree; and the judge must in every case exercise his discretion, in deciding whether the circumstances amount to that degree of need." The motive of the judge in discharging them was obvious, he had to make up his mind what he was to do with the jury on the Sunday—he could not take their verdict on the Sunday: Com. Dig. Temps (B. 3)—it was a judicial act, and one of great importance—he could not keep them in the custody of the sheriff till Monday, for he had no power to order them refreshment; and on that Monday he was required to be elsewhere. In ancient times the jury were coerced into giving a verdict, and the law with regard to our criminal procedure was more strict than at the present day; so late as 1796, in the case of *Rex* v. *Stone* (2) it was discussed whether the Court had power to adjourn in criminal cases, and it was held they had, where it was necessary for the ends of justice. It is clear, therefore, that the present was a case of evident necessity, that the judge has such discretion, and that he rightly exercised it.

Lastly, the discharge of the jury is not equivalent to a verdict of acquittal. That question was indirectly before the Court in *Reg.* v. *Newton.* (1) Lord Denman, C.J., says, "The discharge of the jury

(1) 13 Q. B. 716; 18 L. J. (M.C.) 201. (2) 6 T. R. at p. 530; & note *a*.

1866

WINSOR v. THE QUEEN.

is neither an acquittal nor a conviction—there is no judgment—nothing that would appear upon the record, unless the facts were specially stated in a plea, as in the case of *Conway and Lynch* v. *Reg.*" (1) In that case, however, both sides agreed to discard the pleadings, and treat the question as if it were put on the record. Supposing that the judge was wrong in exercising his discretion, the wrongful discharge of the jury is no bar to a second trial. An abortive trial, however the failure may have been caused, whether by inevitable accident by the act of God, whether from the fault of the judge or the jury, or of both, is no bar to a second trial. No plea in bar alleging an abortive trial has ever been pleaded. Besides the pleas of guilty and not guilty, and of pardon, there are only two pleas, autrefois acquit and autrefois convict, which are now known to the law; in all the numerous cases in which, from some reason or other, the jury have been discharged no such plea has ever been suggested. But there are many instances in which a *venire de novo* has been awarded in criminal cases. In *Rex* v. *Fowler* (2), after the jury had retired, one of them had separated from his fellows, and conversed respecting the verdict with a stranger, the verdict was quashed, and a *venire de novo* awarded.

[BLACKBURN, J. There the Court seemed to have held the first trial to be a mis-trial, and therefore a nullity.]

In *Gray* v. *Reg.* (3) a *venire de novo* was awarded; so in *Keat's* case. (4)

[BLACKBURN, J. In *Rex* v. *Huggins* (5) it is laid down that in cases of mis-trial a *venire de novo* can be awarded, but whether it could be issued in a case of imperfect verdict was not decided.]

In *Campbell* v. *Reg.* (6), this Court awarded a *venire de novo* in the case of an imperfect verdict. In *Reg.* v. *Charlesworth* (7) it may be observed that all through the argument it was taken for granted that the Court had a discretion to discharge the jury, but Cockburn, C.J. (8), says, "Assuming that the judge had not this power, or that he exercised it improperly, the question

(1) 7 Ir. C. L. Rep. 149.
(2) 4 B. & A. 273.
(3) 11 C. & F, 427.
(4) Skinner, 667.
(5) 2 Ld. Raym. at p. 1584.
(6) 11 Q. B. 799.
(7) 1 B. & S. 460; 31 L. J. (M.C.) 25.
(8) 1 B. & S. at p. 506; 31 L. J. (M.C.) at p. 33.

is whether what he has done amounts to an acquittal of the defendant, and entitles him to have judgment entered up as if he had been acquitted. On this I can add nothing to the conclusive reasoning of Crampton, J., in *Conway* v. *Reg.* (1) . . . . When we talk of a man being twice tried we mean a trial which proceeds to its legitimate and lawful conclusion by verdict, and when we speak of a man being twice put in jeopardy, we mean put in jeopardy by the verdict of a jury, and he is not tried nor put in jeopardy until the verdict is given." *Conway and Lynch* v. *Reg.* (1) was well considered in the case of *Reg.* v. *Charlesworth* (2), and all the judges of this Court concurred with Crampton, J., in his judgment.

The only remaining point is as to admissibility of the evidence of Harris. The question does not arise because it is not stated in the record that she was examined; but if it does arise, she is a competent witness both at common law and under 6 & 7 Vict. c. 85: Russell on Crimes, 3 vol. p. 626.

*Folkard* was heard in reply.

COCKBURN, C.J. The question involved in this case has been so recently before the Court in the case of *Reg.* v. *Charlesworth* (2), and has been so fully discussed in the argument during the last two days, that nothing would be gained by taking further time to consider our judgment; especially as there is no doubt whatever in the mind of any member of the Court as to the judgment we ought to pronounce. I have no hesitation in expressing my own opinion, that, after the jury have retired to consider their verdict, and have remained in deliberation a full and sufficient time, if they are not agreed, and there is no reasonable expectation of their coming to a unanimous decision, it is within the province of a judge presiding on a criminal trial, in the exercise of his discretion, to discharge the jury. We are dealing here, not with one of those principles that lie at the foundation of our law, such as the maxim that judges shall decide questions of law, and juries questions of fact, or that the verdict of the jury, in order to be binding, must be unanimous; we are dealing with a matter of practice, which has fluctuated at various times, and which, even in

(1) 7 Ir. L. Rep. 149. (2) 1 B. & S. 460; 31 L. J. (M.C.) 25.

1866

WINSOR v. THE QUEEN.

the present day, may perhaps not be considered as finally settled. The rule laid down by Lord Coke, in the 3rd Institute, p. 110, if it ever was a true exposition of the law, was certainly very speedily departed from; for, in a short time after Lord Coke wrote, we find, from a statement of Lord Hale—I need not say, an authority of the first eminence—that the practice universally prevailed in the administration of criminal justice, where proof turned out upon the trial to be defective, to discharge the jury, in order that the prosecution might come on a future occasion better prepared; and we find that great and eminent lawyer, as well as most humane man, speaking with approbation of that practice, as one essential to prevent the frustration of justice in cases where evidence might have been forthcoming, but happened to be temporarily absent; and he speaks of that practice having prevailed many years. (1) Afterwards in consequence of this practice having been abused in political trials, and possibly also in consideration of the great hardship that might be occasioned to an accused person, who, coming prepared for his defence on the first trial, might be wanting in the means of preparing for his defence on the second, the judges appear to have adopted a different practice, not that there appears to have been any judicial decision on the point, but the judges appear, on consultation among themselves, to have laid down a rule that in criminal trials—at all events, on a trial for a felony—the ~~prisoner~~ jury should not be discharged in the discretion of the judge. (2) But if that resolution was ever acted upon, it certainly was only acted upon for a limited time. In *Kinloch's* case (3), which occurred among the trials which took place under the commission after the rebellion of 1745-46, we find the judges dissenting from that proposition in the general terms in which it had been laid down. In that case, the jury having been discharged with a view of benefiting the prisoners, by giving them an opportunity of putting a plea on the record which they had not up to that time pleaded, it was afterwards objected, that the jury having been discharged, the accused could not be put a second time upon their trial; and, in the opinion of all the judges upon that commission except one, the objection was untenable; and Foster, J.,

(1) See 2 Hale, P. C. 294—5. (2) See Carthew at p. 465.
(3) Foster C. C. 16—21.

gave an elaborate opinion, in which he shewed that the rule, as laid down by Lord Coke in general and unqualified terms, was one that could not be admitted. Shortly after that, we have the great commentator on the English law, Sir William Blackstone, laying down the rule with this qualification, that juries cannot be discharged except in cases of evident necessity. (1) Since that time, the case has several times arisen in which the illness of a juror, or the illness of the prisoner, has been held a sufficient ground for the discharge of the jury; and nobody has questioned that in these cases a second trial might be had, and the accused put a second time on his defence. We find in the case of *Rex* v. *Cobbett* (2), that most excellent and learned judge, Lord Tenterden, discharged a jury of his own act and in the exercise of his discretion, after they had been in deliberation fifteen hours; and other instances have been cited where judges have acted in a similar manner. It appears to me that, if the true principle on which justice ought to be administered is regarded, it is essential in trial by jury not to abridge the judge's discretion, but to leave it unfettered. Our ancestors insisted on unanimity as the very essence of the verdict, but they were unscrupulous as to the means by which they obtained it; whether the minority gave way to the majority, or the reverse, to them appeared to have been a matter of indifference. It was a struggle between the strong and the weak, the able-bodied and the infirm, which could best sustain hunger, thirst, and the fatigue incidental to their confinement. It was said by the prisoner's counsel that it was competent to judges, and the duty of judges, to carry with them in carts a jury, who could not agree, to the confines of the county where the trial was held, or even beyond the county. I doubt whether there is authority for this assertion. The dicta that are to be found in the Book of Assize (3) have been copied servilely by text writers, and that has given rise to this opinion. I question very much whether such a practice ever existed; I am sure it has not in modern times. But suppose it to have been so, we, now-a-days, look upon the principles on which juries are to act, I hope, in a different light. We do not desire that the unanimity of a jury should be the result of

(1) 4 Bl. Com. 360.

(2) 3 Burn's Just. tit. Jurors. 974.

(3) 19 Ass. pl. 6; 41 Ass. pl. 11.

1866

WINSOR v. THE QUEEN.

anything but the unanimity of conviction. It is true that a single juryman, or two or three constituting a small minority, may, if their own convictions are not strong and deeply rooted, think themselves justified in giving way to the majority. It is very true, if jurymen have only doubts or weak convictions, they may yield to the stronger and more determined view of their fellows; but I hold it to be of the essence of a juryman's duty, if he has a firm and deeply rooted conviction, either in the affirmative or the negative of the issue he has to try, not to give up that conviction, although the majority may be against him, from any desire to purchase his freedom from confinement or constraint, or the various other inconveniences to which jurors are subject. When, therefore, a reasonable time has elapsed, and the judge is perfectly convinced that the unanimity of the jury can only be obtained through the sacrifice of honest conscientious convictions, why is he to subject them to torture, to all the misery of men shut up without food, drink, or fire, so that the minority, or possibly the majority, may give way, and purchase ease to themselves by a sacrifice of their consciences? I am of opinion that so far from the practice of thus discharging a jury being a mischievous one, it is one essential to the upholding of the pure, conscientious, and honest discharge of the duties of a juryman.

Then, what authority have we for saying that this discretion ought not to be exercised, when we have so many instances in which it has been practised without objection? We have, certainly, the case of *Conway and Lynch* v. *Reg.* (1), in which the majority of the judges of the Court of Queen's Bench in Ireland held that the discharge of the jury, after they had been kept twenty four hours in deliberation, could not be justified, and consequently the prisoner was not liable to be put a second time on his trial. When the case of *Reg.* v. *Charlesworth* (2) was before us, I took the opportunity of observing that the judgment of Crampton, J., who dissented from the decision of the other judges, carried to my mind perfect conviction. His arguments were overwhelming, and certainly no attempt was made to answer them on the part of the judges who differed from him. Since *Conway and Lynch* v. *Reg.* (1) was decided, the matter has been

(1) 7 Ir. L. Rep. 149. (2) 1 B. & S. 460; 31 L. J. (M. C.) 25.

two or three times in analogous cases under the consideration of this Court. In the case of *Reg.* v. *Newton* (1), although it was not a question on which the decision of the Court was required, still it was necessary incidentally to consider it, and it is impossible to read the judgment of Lord Denman, C.J., and the other members of the Court without being satisfied that in their opinion the discharge of a jury under such circumstances as the present was not a reason why the prisoner should not a second time be put on his trial. *Reg.* v. *Davison* (2) is more directly in point. It is very true that was a case of misdemeanour and this is one of felony, but I can see no distinction whatever between the two classes of cases. In both the principles on which trial by jury is to be conducted are the same, and I am utterly at a loss to see any distinction in principle between them. The facts of the present case are much stronger than in *Conway and Lynch* v. *Reg.* (3) In that case, if the discharge of the jury was a wrongful exercise of the judge's discretion, it followed that the prisoner could not be put a second time on his trial, and *à fortiori* he could not be put a third time; but the facts there were, that the jury had been twenty four hours, and, as it was alleged, a reasonable time in deliberation. I have already pronounced my opinion that that was a sufficient cause for discharging the jury. In this case it appeared that the jury had been five hours only in deliberation, but it was within a few minutes of midnight of the Saturday; and further, on the Monday the judges were bound to be at Bodmin in discharge of their duties, that being the commission day of the assizes. The judge was therefore placed in a position of very great difficulty in consequence of the Sunday intervening. If the next day had been a week-day and not a Sunday: for instance, if the trial had concluded on Friday night, so that the judge had the whole of Saturday before him, I do not doubt that he would have considered that he ought not to have discharged the jury after so short a space of time as five hours. I agree with Mr. Folkard that, if we could review the judge's discretion, it might be said that five hours was too short a time in which to assume that the jury might not by further deliberation have come to a unanimous

(1) 13 Q. B. 716. (2) 2 F. & F. 250. (3) 7 Ir. L. Rep. 149.

1866

WINSOR v. THE QUEEN.

decision; but the intervening day being Sunday, great difficulty presented itself. In the first place the question arose whether the judge should not adjourn till the Sunday and take the verdict of the jury on the Sunday. It is laid down in distinct terms by high authority, that of Lord Coke (1) and Comyns (2), that Sunday is not a juridical day; and it is idle, I think, to contend that the taking of a verdict, the delivering of a verdict on the part of the jury, and the receiving it on the part of the judge, and the recording it, which is also, though the act of the officer, the act of the Court, were not judicial acts; and I entertain the greatest doubts whether the verdict would not have been invalid, if it had been delivered, received, and recorded on the Sunday.

Then it is said that the judge might have adjourned till the Monday, and have kept the jury confined on the Sunday, so as to have received the verdict on the Monday. That, no doubt, could have been done with perfect judicial regularity. But this startling difficulty would arise, that since it would be impossible, because absolutely inhuman, to keep the jury without meat or drink during the whole of the Sunday until the Monday, they having been shut up on the Saturday night, the only alternative would have been to have allowed the jury refreshment in the interval. There is no authority for so doing; I believe the authorities rather point the other way. After once the jury have retired to consider their verdict, there is no authority that I am aware of for saying—or at least no satisfactory authority, for I do not think that what is said in Doctor and Student (dial. 2, c. 52), goes that length; or, if it did, ought to be considered as sufficient to militate against the whole course of practice—that a jury can have refreshment during the period of their deliberation. The oath that is administered to the bailiff has a strong tendency to support this view; he is sworn to keep them without meat, drink, or fire (candlelight excepted); and then it goes on, "nor to speak with them yourself, nor to allow any one else to speak with them without the leave of the Court." The exception as to the leave of the Court relates to persons speaking to them, not to allowing them meat, drink, or fire; and I question very much whether, inasmuch as this system of coercion has been handed down to us from our

(1) See Co. Litt. 135 *a*. (2) See Com. Dig. Temps, (B. 3) and (C. 5.)

ancestors, the judge could take upon himself to alter the practice without the intervention of the legislature; the sooner that occurs the better for the administration of justice. I doubt exceedingly whether a judge could be justified in disregarding this constraint and coercion thus put on the jury by a single act of his discretionary authority in ordering them refreshment. I do not think, therefore, this could be safely done, and therefore the learned judge had the choice of three courses: either to discharge the jury; or to take the verdict on the Sunday; or to keep the jury in confinement till the Monday for the purpose of receiving their verdict, and in the meantime allowing them the necessary refreshment to sustain their strength and health. The judge, therefore, was placed under circumstances of very great difficulty. I am not here in my judgment to review his discretion. I am at a loss to know how I should have acted under similar circumstances; but it was a position of very great difficulty, and one in which, if the exercise of discretion ever was called for, the judge was most especially called upon to exercise discretion; and if he had a discretion, we ought not to say that his discretion was improperly exercised.

These are the facts as set out on this record, with this addition, that it was decided by the judge, that a reasonable time had elapsed, and it was necessary under the circumstances that the jury should be discharged. That brings me to the second question, that is, the necessity to discharge the jury being set out on the record, is it competent to us to review it? I think not. The first question I ask myself is, how is it to be reviewed? It is a fallacy, as it seems to me, to say that "necessity" here is a question of law. It may be a rule of law, or rather a rule of practice, that the judge shall not discharge a jury, except there be a necessity for his so doing; but the question of necessity is necessarily a conclusion—an inference to be drawn from all the facts and circumstances of the case. Whoever heard of a Court of Error sitting to determine a question of fact, to review a question which is purely a question of fact, and not of law? It was well put by the Solicitor General, if this objection can be taken advantage of by stating it upon the record, it might be made the subject of a plea; if it was pleaded, as was done in the case of *Conway and*

1866

WINSOR v. THE QUEEN.

*Lynch* v. *Reg.* (1), a replication would follow; and if the replication were a traverse of the facts, who is to try the facts, the judge or the jury? It seems to me impossible that we can deal with this as a matter of error; it is a matter for the judge in the exercise of his discretion, and no exercise of the discretionary power has been, that I am aware of, ever made the subject matter of error on the record. That was the view unquestionably taken by Patteson, J., Coleridge, J., and the present Chief Justice Erle, in the case of *Reg.* v. *Newton.* (2) It is the clear and unequivocal language of the Lord Chief Baron, Martin, B., and Hill, J., in the case of *Reg.* v. *Davison.* (3) They were all clearly of opinion, that the exercise of a discretion by a judge in such a matter as this cannot be reviewed by a Court of Error; in my opinion, neither in a case of felony, nor in one of misdemeanour. The principle which governs and decides the application of the rule must be the same in both. It seems to me, therefore, perfectly clear that even if this were a case in which the judge had improperly or injudiciously exercised his discretion, and I am very far from saying that is the case here, it is matter which cannot be reviewed upon error. It is true, as the judges of old felt, there are instances in which discretionary power might be grievously abused, and was abused in times such as I trust this country will never see again; but I do not believe that discretionary power ever could be or would be abused at the present day. At the same time, men are open to the infirmities which attach to human nature. I agree that our rules are to be framed to keep the administration of justice beyond the possibility of corruption. On the other hand, if a rule is essential for the convenient working of the administration of justice, we must trust to the honesty of those to whom we commit that most important department of the state. We must trust to the means we have of punishing corruption and dishonesty, if we find it operating on the minds of our judicial officers. I cannot help thinking that this discretion is one of a very useful and salutary character. We must trust that it will never be abused, or, if unhappily it should be abused, we must trust to the power of parliament and the executive for punishing the judge who would act so dishonestly and corruptly.

(1) 7 Ir. L. Rep. 149. (2) 13 Q. B. 716. (3) 2 F. & F. 250.

Therefore I say, in the first place, that there was a discretionary authority, that the judge had power to exercise it; and I say, secondly, whether it was properly exercised or not, it is not a matter that could be brought before a Court of Error upon the record. It has been urged upon us that according to the law of England, no man ought to be put in peril twice on the same charge. I entirely agree. But we must apply that great fundamental maxim of the criminal law according to its true meaning. It means this, a man shall not twice be put in peril, after a verdict has been returned by the jury; that verdict being given on a good indictment, and one on which the prisoner could be legally convicted and sentenced. It does not, however, follow if, from any particular circumstance, a trial has proved abortive, that then the case shall not be again submitted to the consideration of a jury, and determined as right and justice may require. It was urged, also, that there was a difficulty about issuing a second process. It is granted that there are many instances in which, where a jury have been discharged in the proper exercise of a judicial discretion, a second trial may take place; as, for instance, where a juryman, or the prisoner, or the judge, has been taken ill, and the trial has come to a sudden and abrupt termination; and it follows indisputably in all these cases another process for summoning a jury for a second trial would issue. That brings us back to the question whether, in the present instance, the jury were properly discharged. If so, it seems to me to follow, as much in the one case as in the others, that a fresh jury process can issue.

It was pressed on us also that the evidence of the accomplice, Harris, had been improperly received. That is a matter which we cannot take into account. It was alleged that the accomplice came forward to give evidence under peculiar circumstances. The plaintiff in error and Harris were both joined in one indictment, and on the first occasion were tried together. On the second, it was proposed on the part of the prosecution to sever the trial with the view to the one prisoner becoming a witness against the other. No doubt that state of things, which the resolution of the judges, as reported to have been made in Lord Holt's time, was intended to prevent, occurred. (1) It did place the prisoner

(1) See Carthew, 465.

1866

WINSOR v. THE QUEEN.

under this disadvantage; whereas, upon the first trial that most important evidence could not be given against her, it was given against her upon the second, so that the discharge of the jury was productive to her of that disadvantage. I equally feel the force of the objection that the fellow prisoner was allowed to give evidence without having been first acquitted, or convicted and sentenced. I think it much to be lamented. In all cases where two persons are joined in the same indictment, and it is desirable to try them separately, in order that the evidence of the one may be received against the other, I think it necessary, for the purpose of insuring the greatest possible amount of truthfulness in the person coming to give evidence, to take a verdict of not guilty as to him, or if the plea of not guilty be withdrawn by him, and a plea of guilty taken, to pass sentence; so that the witness may give his evidence with a mind free of all the corrupt influence, which the fear of impending punishment and the desire to obtain immunity to himself at the expense of the prisoner, might otherwise produce. This objection is not set forth upon the record; in a civil case a question as to the reception of evidence may be raised on a bill of exceptions, but in a criminal case it cannot be raised upon the record so as to constitute a ground of error; we cannot, therefore, take it into consideration. Whether this circumstance should have any influence elsewhere is a matter upon which it is not for us to pronounce an opinion.

1 C&P 357

Under all these circumstances, I am of opinion that in this case the facts warranted the exercise of judicial discretion. I am further of opinion that even if the discretion was injudiciously exercised, it is not a matter that it is competent for us to review. For these reasons our judgment must be for the crown.

BLACKBURN, J. On a writ of error we have only one course that we can take; it is, to enquire whether the conviction, as appearing upon the record, is good or bad. I am of opinion that it is good. If this point had been raised now for the first time, and if it had not been recently discussed, I should have wished for more time to consider my judgment, and I should have entered at greater length into the authorities than I

propose to do; but the subject has been exhausted by Crampton, J., in the case of *Conway and Lynch* v. *Reg.* (1), where, in an admirable judgment, that learned judge has reviewed all the authorities; although his argument failed to convince his colleagues, it has convinced me that his statement of the law is correct. Besides, we have had occasion very recently in the case of *Reg.* v. *Charlesworth* (2) to give the subject great consideration; and there, except that that was a case of misdemeanour, while this is one of felony, the same point was raised, and the judgment of this Court delivered at length. Moreover, I entirely agree with all that my Lord has now said.

I assume that, to a certain extent, there is no doubt as to what the law is; where a person is charged with a crime, whether it be felony or misdemeanour, and he has pleaded not guilty, a jury process is issued, by which a jury is summoned to try the question, and when the jury have been brought together, the prisoner has been given in charge, and the trial has commenced, there is no doubt that the right course, if practicable, and the course that ought to be adopted, unless there is some reason to the contrary, is, that the jury should proceed to give their verdict, acquitting or convicting the prisoner. When the jury have once found their verdict of conviction or acquittal, the matter has become *res judicata*, and after that there can be no further trial. If after the jury have found their verdict, the Court were to issue process for the purpose of summoning another jury to try the question again, on the same indictment on which the jury have already pronounced a verdict, such a proceeding would be erroneous, and the proper remedy would be to bring a writ of error; the error being, that whereas there was an acquittal or a conviction which terminated the whole question, process had issued to a fresh jury. If, instead of proceeding on the same indictment, a second indictment were found, it would be necessary for the prisoner to plead a plea of autrefois acquit, or autrefois convict, as the case might be, and that would raise the same question of law; but in each,

2 PC 547

(1) 7 Ir. L. Rep. 149; Crampton J.'s judgment is also given in 31 L. J. (M. C.) 46.

(2) 1 B. & S. 460; 31 L. J. (M. C.) 25.

1866

WINSOR v. THE QUEEN.

the question would be, had the matter been so determined by the jury as to have become *res judicata?* Now it is material to recollect that, in the case of a second indictment being found, the pleas which I have mentioned and which are well known to the law may be pleaded in bar. No other pleas have ever been pleaded, except the strange pleadings in the case of *Conway and Lynch* v. *Reg.* (1), and which would have been bad for many reasons, if all objections of form to them had not been waived. Except in that solitary case there never has been a plea to the effect that the prisoner had been given in charge to a jury, and the jury had come to no conclusion; the object of pleading the plea being that it should have the effect of preventing the prisoner from being tried again, just as if the jury had pronounced a verdict finding him guilty or not guilty. The fact that no such plea can be found in any report is a strong argument that an abortive trial is no bar to a second indictment for the same offence. If instead of proceeding upon a fresh indictment a second jury process were issued upon the same indictment, and the question were raised on the record, whether the proceeding to get together a second jury after the matter was not disposed of by the first, was correct, the question would be exactly the same as if the matter had been pleaded to a second indictment. Would the fact that the prisoner had been given in charge to the jury, who came to no conclusion for the reasons stated upon the record, have afforded a bar to the second indictment? If it would, the proceedings to summon a second jury would have been erroneous, and the verdict would have been bad; but if the facts would have afforded no defence to the second indictment for the same matter, I cannot see how on any principle of law it can furnish a ground of error. I do not propose to enter upon an examination of all the authorities cited by the prisoner's counsel. There is the dictum of Lord Coke (1st Inst., 227 b.; 3rd Inst., 110), that the jury once charged with the prisoner in a case of felony ought not to be discharged without giving a verdict. It is conceded, if possible, that ought to be done; but upon this is founded the inference, that if a jury, when in charge of a prisoner, do not dispose of the plea of not guilty, no other jury can ever dispose of it, and consequently no

(1) 7 Ir. L. Rep. 149.

second jury process can issue to try the same indictment. Down to the time of the revolution, as appears in Lord Hale's Pleas of the Crown (2nd vol. pp. 294—295), it was customary to discharge the jury without giving a verdict. In *Reg.* v. *Charlesworth* (1) we pointed out that after the revolution the practice was strongly condemned, it having been abused during the state trials which preceded that event; and it was erroneously thought that if a trial proved abortive for any reason it was equivalent to an acquittal. *Kinloch's* case (2) plainly shews that this impression was unfounded. There it was decided that where the jury had been brought together, it was for the presiding judge, acting in his judicial discretion, to determine whether there was a case for discharging the jury; and if he determined that there was, his decision could not be questioned. It was also held in *Reg.* v. *Davison* (3), that the judge had a discretionary power to discharge the jury. I am not aware that this rule of practice, except in *Conway and Lynch* v. *Reg.* (4), was ever departed from. It is obvious, when we come to consider it, that in the cases which are not disputed, the jury must be discharged and the trial go off; for instance, where a juror is ill, it must be for the judge to determine, as a mixed question of fact and law, whether the illness of the juror is such as that the trial cannot be carried on. If a juryman has merely fainted because the court is hot and close, it would be proper to wait a short time, and then proceed; but if he is taken ill so that there is no likelihood of his continuing to discharge his duty without danger to his life, the jury must be discharged. Must not it then be for the judge to determine, as a matter of fact, whether the extent of the illness is such as to make the proceeding with the trial practically not right, and consequently to discharge the jury? Suppose a case, as at Liverpool, where the assizes last for a fortnight, and sometimes longer, the judge must be able to discharge the jury, upon necessity; it could never be that, if a juror fell ill during the assizes, the jury could not be discharged until a fortnight had expired. Who can tell as a matter of certainty whether the juryman might not recover? The judge, if it was a matter of dis-

(1) 1 B. & S. 460; 31 L. J. (M.C.) 25.
(2) Foster, C. C. 16—21.
(3) 2 F. & F. 250.
(4) 7 Ir. L. Rep. 149.

1866

WINSOR v. THE QUEEN.

cretion, deciding upon the facts and the evidence before him, would determine for himself what his duty should be. He determines it at the time, but he determines it upon the mixed question of fact and law, and acting upon the facts before him, discharges the jury. It seems to me that if the jury have been long in deliberation, and are unable to arrive at a verdict, a similar question arises for the consideration of the judge. It cannot be said, as a matter of law, that he is bound to wait until one of the jurors falls ill, that would be far too barbarous a rule. On the other hand, it cannot be said that he ought only to wait until the jury say they are not likely to agree. We know from experience that jurors frequently say they are not likely to agree. They are then advised to talk it over amongst themselves, and whether it be that they do talk it over, or whether it be that they are coerced, by finding it unpleasant to be in confinement, we know that they do afterwards often agree; but it must always be a question of discretion for the judge at what time the jury shall be discharged. I agree with what Lord Tenterden said in one of the cases, that few things are more painful to the judge than to decide questions which involve the exercise of a discretion. (1) As far as our choice goes, we should be glad to have a fixed rule to relieve us from such a necessity; it is nevertheless a matter upon which the judge must exercise a discretion, not capriciously, but upon the facts.

The next question is, can we in a Court of Error review the discretion of a judge upon a question of mixed fact and law? In the case of *Conway and Lynch* v. *Reg.* (2) the majority of the judges in the Queen's Bench in Ireland held that they could. I invited Mr. Folkard in the course of the argument to mention, with that exception, any case, criminal or civil, in which the discretion of the judge exercised upon a mixed question of law and fact was reviewed in a Court of Error, and he was unable to refer to any. I know that, so far as my own knowledge goes, there is none. Could we on principle review that discretion any more than we could review the verdict of the jury? It may be, that the verdict may have been returned against evidence, but that cannot be reviewed in a Court of Error; because the evidence upon which the jury

(1) See *Rex.* v. *Woolf*, 1 Chit. Rep. 421—422. (2) 7 Ir. L. Rep. 149.

decided the question of fact cannot be brought up to a Court of Error; and so where the judge upon a question of law and fact decides judicially upon the facts, as appearing to him, that it was necessary to discharge the jury, we cannot review his discretion. On this point I am of opinion that Crampton, J., was right in his judgment in *Conway and Lynch* v. *Reg.* (1)

It becomes unnecessary to inquire whether Channell, B., rightly exercised his discretion. I may, however, observe that the trial having begun on Friday morning, it was contemplated that there was ample time to finish it before Saturday evening; it was unexpectedly protracted, and, consequently, a few minutes before twelve on Saturday, before the Sunday morning, the learned judge was left to determine for himself about as difficult a question as could be determined. If he had, as Mr. Folkard suggests, waited, and allowed the jury to continue in consultation as if it were a week day, and then the jury had returned a verdict on the Sunday, would their verdict have been legal? I should not like to decide that question which is not raised here; but I do not think there can be the smallest doubt that to sit judicially on Sunday on any business would be indecent and improper, and ought never to be done if it can be helped. That much no one can doubt. It is, upon the authorities, a matter of the gravest doubt, whether a verdict taken on Sunday would not be void in point of law, so that in a Court of Error a conviction might be set aside. I have already stated that this point is not before us, and I do not wish to give any decision upon it; but I do say that it is a question of the gravest consideration, and I think that on a question of discretion, such as this, when the judge was driven so close to midnight, we can never say it was not a proper exercise of his discretion, and that he was not right to discharge the jury in order to avoid raising this question.

Then it is said that he might have adjourned until Monday without taking the verdict, and during the twenty four hours of the Sunday he might have ordered the jury refreshment. I do not wish to decide a question which is not before us; it may be a question of doubt whether, if the judge were to order the jury refreshment it might not vitiate the verdict; it may be *quod fieri*

(1) 7 Ir. L. Rep. 149.

1866

WINSOR v. THE QUEEN.

*non debet factum valet;* but where the question is whether the judge is rightly exercising a discretion, are we to say, because he did not raise this doubtful question, but discharged the jury, that he did not exercise a right discretion? I think under these difficult circumstances the judge did right. As I said before, this is not a question which we can decide, because I hold that, the judge having exercised his discretion on a matter over which he had jurisdiction, his discretion cannot be reviewed in a Court of Error.

Then there is another point upon which I shall say very little; assuming that the judge was wrong in discharging the jury, would that, as a matter of law, entitle the prisoner to be discharged? I think not. It is the duty of the judge to take care that the verdict of the jury is not imperfect, and if the jury have omitted completely to answer the questions left to them, he ought to point out the omission and have it corrected. When, however, the judge receives an imperfect verdict, and discharges the jury, recording that imperfect verdict, it is clear that the judge has made a mistake; he ought not to have discharged the jury. It is equally clear in all civil cases, where the verdict has failed to be a correct verdict in consequence of the conduct of the judge, and also in all cases of misdemeanour, the proper course for the Court is to order a *venire de novo*, that the case may be tried again. The point has been raised whether a *venire de novo* can be awarded in the case of a felony. The doubt is founded upon the above dictum of Lord Coke (1), and the point was raised in the case of *Rex* v. *Huggins* (2) reported by Lord Raymond himself, and therefore an authentic report. After stating at page 1584 in what cases a *venire facias de novo* must issue, at page 1585 he observes, "In capital cases a *venire facias de novo* must go: 1. In cases of mis-trial, 6 *Co.* 14*a*. *Arundel's* case, the point agreed. 2. For misbehaviour of the jury in giving their verdict, *Hil.* 8 *Hen.* 7, *rot.* 3. *Placit. Reg. Rex* v. *Wayner*. Agreed. 3. As to granting a *venire facias de novo* after a special verdict found, they were so candid as to own, that though there was search made with the greatest diligence, yet they could not find one instance, nor so much as an opinion of a judge, except what was said by Lord

(1) 1st Inst. 227 b; 3rd Inst. 110. (2) 2 Ld. Raym. 1574.

Chief Justice Holt in the case of the *King* v. *Keite*, *Comb.* 408. Holt says: 'I should not be much against a *venire de novo*.'" Therefore the case *Rex* v. *Huggins* (1) amounts merely to this, that the point was argued and gravely considered, but was not determined. This case was cited in *Gray* v. *Reg.* (2), which was a case of mis-trial, and there the House of Lords awarded a *venire de novo*. In *Campbell* v. *Reg.* (3) this Court awarded a *venire de novo* on a charge of felony where the jury found an imperfect verdict; but when error was brought in the Exchequer Chamber on the judgment of the Court of Queen's Bench, Parke, B., now Lord Wensleydale, evidently having regard to the doubt on this point, which was not determined in the case of *Reg.* v. *Huggins* (1), in delivering the judgment of the Exchequer Chamber (4), pointed out that there had been a mis-awarding of the jury process, and on that ground affirmed the judgment of the Court of Queen's Bench. That case, as decided in the Exchequer Chamber, resembles *Gray* v. *Reg.* (2); but it leaves untouched the question whether a *venire de novo* may issue in a case of felony for a defective verdict. There is now, therefore, a decision of this Court that a *venire de novo* can be awarded on an imperfect verdict. I mention this to shew that there was, at that time, no authority for the reasons given by Crampton, J., in the case of *Conway and Lynch* v. *Reg.* (5), that a *venire de novo* could issue in a case of felony for an imperfect verdict; but I entirely concur in the conclusion at which he arrives, that where there has not been a verdict decisive of the guilt or innocence of the prisoner and the indictment has not been disposed of, whether it be owing to the mistake of the judge, the fault of the jury, inevitable accident, or the improper discharge of the jury, in all these cases indifferently a *venire de novo* ought to be awarded. I am, therefore, of opinion that the discharge of the jury at the first trial was not equivalent to an acquittal, and that the prisoner was rightly tried at the second.

The last objection made was, that the evidence of the fellow prisoner was improperly received. It is sufficient to say that that objection does not appear upon the record; the improper reception

(1) 2 Ld. Raym. 1574.
(2) 11 Cl. & F. 427.
(3) 11 Q. B. 799.
(4) 11 Q. B. at pp. 838—839.
(5) See 7 Ir. L. Rep. at p. 178; 31 L. J. (M. C.) at p. 50.

1866

WINSOR v. THE QUEEN.

of evidence moreover cannot be a ground of error. I may, however, observe, although the question does not come before us, I do not think Harris was an inadmissible witness, but being admissible she was completely within the category of accomplices. It would be right to tell the jury to look at her evidence with great caution. I do not doubt that the judge did carefully caution the jury, nor do I doubt that there was ample confirmatory evidence. I agree that it would be judicious as a general rule, where the accomplice is indicted, that the indictment as to her should be disposed of before she is called as a witness, so that the temptation to strain the truth should be as slight as possible. I do not think that this is an objection to the legality of the evidence, but is a matter which affects the degree of credit which ought to be given to her testimony.

MELLOR, J. I also am of opinion that our judgment must be for the crown on all the errors assigned. I admit that there is a distinction in the mode of procedure in cases of felony and of misdemeanour. It was said that formerly in a case of misdemeanour the jury could not be discharged, after having been charged with a prisoner, until they had given their verdict; and it was the practice to keep the jury together until they had agreed upon their verdict, so that even upon an adjournment of the court they were not allowed to separate (1), but it is now the common practice, when the court is adjourned, to allow the jury to separate, although the same practice does not prevail in the case of felony. Although it may be wise, as a general rule, not to discharge a jury in a case of felony, still I am of opinion that no general rule, with respect to the discharge of the jury by a judge, can be absolutely binding under all circumstances, without leading to manifest absurdity. If a judge is to exercise no discretion, but is bound, as was said in one of the old cases (2), to carry the jury with him to the confines of the county, or round the circuit, still a time must arrive at which the judge will have to discharge the jury, if they do not agree. It is so absolutely inconsistent with our modern ideas that a judge should carry a jury in a cart

(1) See *Rex* v. *Kinnear*, 2 B. & A. 462.

(2) 19 Ass. pl. 6; 41 Ass. pl. 11; 1 Vent. 97.

with him to the confines of the county, or round the circuit, and then turn them out, that I apprehend no judge would commit an act so grotesquely absurd. If a judge has no discretion in the matter, the criminal business of the country could not be administered. The judge learns that the jury cannot agree; he waits for a time which, in his opinion, is abundantly sufficient for them to agree; but he finds it hopeless after the time they have already consulted that they will agree. What is he to do? The counsel for the prisoner says the judge ought to carry them to the confines of the county. That I have disposed of. Then it is said, the jury ought not to be discharged until the end of the assizes. My Brother Blackburn has pointed out, that in some places the assizes may last a fortnight. It would be a monstrous thing for the judge to keep the jury in confinement during that period. Is there, then, ever to be a time at which the jury are to be discharged? I think there is; and if it is once admitted that there is, then it must be left to the judge to exercise his discretion at what time they shall be discharged.

The record states several causes for which the judge decided that it was necessary to discharge the jury; that the jury had not agreed upon their verdict, and unanimously declared that they were unable to agree; that after five hours deliberation they were unable to agree; that all the business of the assizes was over; that the Lord's day was immediately at hand; and that the judges were required to proceed on the following Monday to the adjoining county. Under these circumstances it is impossible to contend that the learned judge could have adopted any other course than that which he took. To have kept the jury locked up until the Monday morning, without meat, drink, or fire—supposing it could be done—is something so incongruous with modern opinion, and so extreme a measure to adopt, that I think it tends to shew that the judge must have a discretion to discharge them, and is not compelled to wait until the confinement and exhaustion have affected their health and endangered their lives.

It is also argued that the learned judge could have taken the verdict of the jury on the Sunday. I think that argument has been completely answered by my Lord. It is not a ministerial act. The judge cannot take the verdict at his chambers; he must

1866

WINSOR v. THE QUEEN.

come into court; the prisoner must be present; he must be brought up to hear the verdict pronounced by the jury; and then the verdict must be recorded by the officer of the court, under the direction of the judge. These proceedings shew that it is not a ministerial but a judicial act, and a judicial act of the highest importance. Can such an act be done on a Sunday? Without deciding this question, I must say I entirely concur with my Brother Blackburn that for the learned judge to sit in court upon a Sunday would be improper if it could be helped, and I confess I am inclined to think that the verdict of a jury could not be taken upon a Sunday. If these grave questions arose for the consideration of the judge at the moment, and he had at once to determine them, and if he thought—as probably he did—that the verdict could not be taken on the Sunday, the only other alternative was to keep the jury till the Monday morning, when the commission required the judge's presence in another county. All these were circumstances to induce him to act upon the opinion which he had formed, and no better course has been pointed out than the one he pursued.

It being decided that it must be a matter for the discretion of the judge at what time he will discharge the jury, the next question is, can that discretion be reviewed in a Court of Error? I am clearly of opinion that it cannot. I agree with Coleridge, J., in what he says in his judgment in *Reg.* v. *Newton* (1), that the judge, to ascertain whether a case of necessity has arisen for the discharge of the jury, must take into consideration all the circumstances of the case, and, acting on the circumstances as they appear to him at the time, he must determine whether it is proper for him to exercise his judicial discretion. If that be so, how can the judge's discretion be reviewed? Suppose the judge discharged the jury owing to the illness of a juror? That is admitted to be a case of necessity. How is it to be determined by a Court of Error? If the judge must determine whether it is necessary to discharge the jury by reason of the illness of a juror, and this is stated on the record, the Court of Error cannot review it, because the actual fact of necessity is found by the judge. Suppose the necessity to discharge the jury arose from the illness of the judge.

(1) 13 Q. B. at p. 733.

1866

WINSOR v. THE QUEEN.

The judge says, "I am too ill to proceed with the trial; I must discharge the jury." How is the exercise of his discretion to be reviewed? Is the Court of Error to determine whether or not the judge was too ill, and whether the judge was wrong in saying he was too ill? It is manifestly absurd to hold that a Court of Error had power in such cases to review the judge's discretion. If the Court of Error cannot entertain the question, can it be made the subject matter of a plea? The plea would be that the judge was too ill, and decided that he was too ill to continue the trial, and that he discharged the jury. The question for the jury on issue joined would be, whether the judge was too ill to continue the trial, and whether his discretion had been properly exercised. Could anything be more indecent or absurd, than that a jury should, at some future state of the case, determine these questions? If the exercise of the discretion of a judge cannot be made the subject of a plea, neither can it be reviewed in a Court of Error.

I think my Brother Channell exercised a most prudent discretion under very embarrassing circumstances. I think he was perfectly well warranted and justified, in the present case, in discharging the jury. I feel bound to say that I think he adopted a right course, and any other exercise of discretion would have raised a matter of grave doubt.

But, admitting he was wrong, and did discharge the jury erroneously, and exercised his discretion erroneously, is the discharge of the jury equivalent to a verdict? The only case in which it has been so contended is *Conway and Lynch* v. *Reg.* (1) To an indictment for felony, with the exception of the plea of not guilty, I have heard only of four pleas, autrefois acquit, autrefois convict, autrefois attaint, and a pardon, being pleadable in bar. If the facts of this case cannot be brought within either of these pleas, there is no other mode of pleading them. I think the judge has a discretion to discharge the jury, and he must exercise that discretion to the best of his ability for the public good under the responsibility of his oath; and I do not apprehend any danger that a judge would exercise that discretion arbitrarily, or negligently, or corruptly.

There is only one other point referred to by the Lord Chief Justice which it is necessary to mention. Owing to the accidents

(1) 7 Ir. L. Rep. 149.

1866

WINSOR v. THE QUEEN.

of this case it happened that, on the second trial, the prisoner was in a different position to what she had been on her first trial. On the first occasion, the witness Harris was tried with her. On the second occasion, Harris was not tried with the prisoner. On an application specially made on the part of the Crown, the prisoner was tried by herself, and Harris, although she had not pleaded guilty, and although no verdict of acquittal was taken, was called as a witness. She was, therefore, liable herself to be tried. I think the temptation held out by this course, especially to an ignorant witness, to give false evidence, very great; a witness ought always to give evidence without fear of any consequences pending over him. I am, however, of opinion that the judge on the second trial had no alternative but to receive the evidence, which I think was clearly admissible, although subject to strong observation as to its weight.

For these reasons I think that our judgment ought to be for the crown.

LUSH, J. After the judgments of my Lord and my learned Brothers, I should, if this had been an ordinary case, have contented myself by concurring in their opinion: but considering the wide importance of the question involved, I think it right that each judge should state the grounds of his judgment. I need hardly say that I entirely concur that the decision of the Court below must be affirmed. There are, in substance, two errors relied on by the prisoner, the plaintiff in error. The one on which the greatest stress has been laid, divested of all technicality and verbiage, amounts to this: that the trial at which the prisoner was found guilty was a mis-trial or a void trial, that the jury had no jurisdiction to take her in charge or find a verdict against her, and consequently the judge had no jurisdiction to pass sentence, because she had before been given in charge to a jury upon that same indictment, who had been discharged from giving a verdict under the circumstances stated on the record. That is the proposition for which Mr. Folkard contended as the substance of the first ground of error; and it is alleged that to put a person under those circumstances on a second trial is a violation of the well-known fundamental maxim of the law, that a man shall not

be twice vexed for one and the same offence. Is this maxim applicable to criminal as well as civil proceedings? I think it clear that there is no distinction between the two as to the applicability of that fundamental rule; whenever it applies, it applies to both. The rule can be illustrated or interpreted by referring to the plea which would raise the defence, the plea of autrefois acquit, or its converse, in a criminal case, or a plea of judgment recovered, or its converse, in a civil action. The meaning of the maxim is that, where the matter has been once litigated and brought to an end by means of the proceedings having gone on to a termination, the verdict or judgment shall be a bar to a second trial or litigation upon the same matter. That is the meaning of the rule, so far as all the illustrations go, and so far as any dicta can be found in the books upon it. Now, it is sought to engraft upon that maxim another meaning, and to argue that where the first trial had become abortive and had never gone on to its termination, it should still be a bar to a second trial for the same cause. I may say there is no authority and no dictum to be found in the books in support of that proposition; it is not within any principle of law. Even Lord Coke, in that part of his book which contains the passage so much commented on (1), which states that a jury once in charge of a prisoner cannot be discharged, does not intimate that, if the jury should be discharged, that discharge would be equivalent to an acquittal and pleadable in bar by the prisoner; nor is there any intimation in any of our books favourable in any degree to that proposition; and, until it was pleaded in the case so much referred to, *Conway and Lynch* v. *Reg.* (2), it does not appear that such a defence was ever made. That case is the only authority that can be found in support of it. With great respect for the majority of the learned judges who decided that case, I do not agree with them in their decision. It seems to me to be at variance with principle and authority. I, with the other members of the Court, adhere to what is esteemed the very preferable judgment of Crampton, J., and we do no violence to the maxim by holding that, when the first trial has become abortive by any means whatever, the proceeding is not legally a bar to a second trial for the same offence.

(1) 1 Inst. 227 b; 3 Inst. 110. (2) 7 Ir. L. Rep. 149.

1866

WINSOR v. THE QUEEN.

I think if there be no legal bar to a second trial, the case is disposed of, and it would be unnecessary to say more. But as it has been much discussed whether a judge has the power in a criminal case to discharge a jury, where he is satisfied that they are unable and will be unable to come to a unanimous verdict, I desire shortly to state my opinion on this point. If there were no authority, one way or the other, it would seem to me such a power is necessarily vested in a judge, because, while our law requires unanimity, there must be a time, if the jury continue to disagree, at which they must be discharged. The dictum which has been imported into our text books, and regarded as authority for so long a period, and which I must say I more than once have read with feelings of humiliation as a lawyer, "That if the jurors do not agree the judges may carry them round the circuit, from town to town, in a cart," has been traced up to its source (1), and I am glad to find that it rests on no foundation of judicial decision, or actual practice. But even that dictum assumes that a time must come when the judge at the trial must act and when the jury must be discharged, and it seems of necessity, so long as we require unanimity and there is only a limited time for the performance of their duty, there must be a power in the judge to discharge the jury. If so, who is to decide the proper time at which the jury may be discharged? No one but the judge himself. Notwithstanding that dictum of Lord Coke, which I cannot consider as laying down any rule of law, but merely as a direction to, and a proper one as guiding judges in their practice, we find it was the practice in Lord Coke's time (2), and it has been the practice since, in cases of necessity, for the judge to discharge the jury, and if he has the power to discharge the jury it must be in his discretion at what time he shall exercise the power.

If that be so, and the judge has bonâ fide exercised that power, is it a discretion capable of being reviewed in a Court of Error? It is enough to say, if it be a matter in the discretion of the judge, it cannot be reviewed by a Court of Error. The province of a Court of Error is to correct errors of law, it cannot review the discretion of a judge exercised in matters of fact. I desire to say, in order that I may not be misunderstood, if we could review the

(1) 19 Ass. pl. 6; 41 Ass. pl. 11. (2) See 2 Hale, P. C. 294—295.

decision at which the learned judge has arrived, that after the jury were, in his judgment, kept in consultation a sufficient length of time, and he was satisfied that they had given the best attention to the matter, and had exhausted all argument and persuasion to arrive at a unanimous verdict, and they announced to him that they did not agree, and they would still be wholly unable to do so, I should consider that to keep them in custody and under the privations to which they must be exposed, would be a kind of coercion not justifiable in the present day, and not the mode in which the administration of justice ought to be carried on. I, therefore, think that the learned judge acted with propriety and prudence in discharging the jury.

The other objection relates to the admissibility of the evidence of Harris on the second trial. As to that, it is enough to say in my judgment her testimony was admissible, but whether admissible or not, it is an objection which cannot be put on the record, and therefore cannot be treated as a ground of error. For these reasons I am of opinion that our judgment must be for the crown.

COCKBURN, C.J. The judgment of the Court is, that the judgment of the Court of Gaol Delivery for the county of Devon be affirmed, and that the keeper of the gaol of Newgate, present here in court, do re-deliver the said Charlotte Winsor, the plaintiff in error, into the custody of the sheriff of the county of Devon and keeper of Her Majesty's gaol for the said county, and that the sheriff of the county of Devon do execution upon the said Charlotte Winsor in pursuance of the said judgment of the said Court of Gaol Delivery, and according to due form of law.

*Judgment affirmed.*

Attorneys for plaintiff in error: *Burt & Stevens.*
Attorneys for crown: *Solicitors to the Treasury.*

1866
*Feb.* 3.

[IN THE EXCHEQUER CHAMBER.]

## THE QUEEN *v.* THE LOCAL BOARD OF HEALTH OF THE BOROUGH OF GODMANCHESTER.

*"Sewer"—Public Health Act*, 1848 (11 & 12 *Vict. c.* 63), *ss.* 2, 43, 58—*Duty of Local Board of Health to cleanse ditches.*

A stream supplied by the drainage, natural and artificial, of cultivated land, and receiving the drainage of two or three inhabited houses in its passage to the river into which it flows, is not a "sewer" within the meaning of the Public Health Act, 1848.

A mandamus to a local board of health alleged that a drain or watercourse was in such a state as to be a nuisance injurious to health, and commanded the board to cleanse it. On a return and plea, the stream was found to be in the state alleged:—

*Held*, that the prosecutor was not entitled to judgment: for that the duty of the local board, under section 58 of the Public Health Act, 1848, to cleanse drains, &c., is only conditional on the neglect of the owner or occupier of the land on which the nuisance exists to remove it after notice, and no such notice or neglect was alleged in the mandamus.

ERROR from the judgment of the Court of Queen's Bench, adjudging the defendants to be entitled to have the verdict entered for them on the first and second pleas to a return to a mandamus, on the facts appearing in a special case; and directing the verdict to be entered accordingly. (1)

The mandamus was to the Local Board of Health of the borough of Godmanchester, and recited that there exists in the borough of Godmanchester, and within the limits of the jurisdiction of the local board, a certain drain and sewer and watercourse called Stonehill Brook, beginning at the London turnpike road, crossing a highway called the Gravelly Way, into an ancient watercourse leading into the town street of Godmanchester, along part of the said town street, and thence into the river Ouse, which said drain and sewer and watercourse is vested in and is under the management and control of the board. That it is the duty of the board, under the provisions of the Public Health Act, 1848, to cause the said drain, sewer and watercourse to be properly scoured, cleansed, emptied, and kept, so as not to be a nuisance or injurious to health.

(1) See the report of the case in the court below, 34 L. J. (Q.B.) 13.

That the said drain, sewer, and watercourse has been for some time past and now is in a foul, unclean, and improper state and condition, so as to be a nuisance and injurious to health. And further, that the said drain, sewer, and watercourse, for want of the same being properly scoured, cleansed, emptied, and kept, has become, and now is, liable to overflow and damage, and that the water thereof has by reason of the same not being properly scoured, cleansed, emptied, and kept, on several occasions overflowed and greatly damaged the lands adjoining and near to the said drain, sewer, and watercourse, and also a certain public way called Gravelly Way. And commanded the board that they cause to be properly cleared, cleansed, emptied, and kept, the said drain, sewer, and watercourse.

Return, that the said drain, sewer, and watercourse, called Stonehill Brook, was not, nor is, a sewer vested in or under the management and control of the local board of health, as in the writ alleged, nor was nor is it their duty, under the provisions of the Public Health Act, 1848, to cause the said drain, sewer, and watercourse to be scoured, cleansed, emptied, or kept, so as not to be a nuisance or injurious to health. Further, that the said drain, sewer, and watercourse, was and is a sewer made and used for the purpose of draining, preserving, or improving land under a local and private act of parliament, to wit, 43 Geo. 3, c. 3, intitled "An Act for dividing and inclosing certain open and common fields, meadows, lands, commons, and commonable places, within the parish of Gumecester, otherwise Godmanchester, in the county of Huntingdon;" and that the said sewer, at the times in the writ mentioned, ought to have been, and still ought to be, repaired, scoured, cleansed, emptied, and kept, by and at the expense of all the proprietors of the lands and grounds which were divided and enclosed by virtue of the said act of parliament, and not by the local board. And further, that the said drain, sewer, and watercourse was not, nor is, in a foul, unclean, or improper state or condition, so as to be a nuisance and injurious to health, as in the writ alleged. And further, that the said drain, sewer, and watercourse, for want of being properly scoured, cleansed, emptied, and kept, had not become, nor was, nor is, liable to overflow and damage, nor had overflowed and damaged, the said land or the

1866

THE QUEEN v. GODMANCHESTER LOCAL BOARD.

said public highway called Gravelly Way, as in the writ mentioned.

Pleas. 1. That the said drain, sewer, and watercourse, in the writ and return mentioned, was and is a sewer vested in and under the management and control of the local board of health, and that it was and is the duty of the board, under the provisions of the Public Health Act, 1848, to cause the said drain, sewer, or watercourse, to be scoured, cleansed, emptied, and kept, so as not to be a nuisance to health as in the writ mentioned. 2. That the said drain, sewer, and watercourse, in the writ mentioned, was not, nor is a sewer made and used under the said act of parliament; and at the times in the writ mentioned, ought not to have been, and still ought not to be repaired, scoured, cleansed, emptied, and kept, by and at the expense of all the proprietors of the lands and grounds which were divided and inclosed by virtue of the said act of parliament, as in the second paragraph of the return is alleged. 3. That the said drain, sewer, and watercourse, was and is in a foul, unclean, and improper state and condition, so as to be a nuisance, and injurious to health, as in the writ mentioned. 4. That the said drain, sewer, and watercourse, for want of being properly scoured, cleansed, emptied, and kept, had become, and was, and is, liable to overflow and damage, and has overflowed and damaged, the said lands and the said public highway.

Issue joined.

On the case coming on for trial at the Huntingdon Summer Assizes, 1863, it was agreed to refer to an arbitrator to settle and determine the question as to the origin, nature, and extent of the Stonehill Brook, and what was done to it by the Inclosure Commissioners, and what alterations, if any, were from time to time made, and by whom; and that the facts should be stated in a special case for the consideration of the Court, who were to draw conclusions from the facts.

1. In the year 1802 the Godmanchester Inclosure Act, 43 Geo. 3, c. 3, intitled as in the return mentioned, was passed.

2. This act, the writ, return, and pleadings, and a map annexed, were to be taken as part of the case.

3. The commissioners appointed under the above act made their award on the 23rd June, 1809, and by it set out and appointed,

among other things, "one other public drain or watercourse, four feet wide, beginning at the London turnpike road into and over an allotment to the Dean and Chapter of Westminster, and their lessee along Shooter's Hill, and thence through and over the allotments to Samuel Bleckley, Lady Olivia Sparrow, and John Martin, to and across Gravelly Way, and thence over an allotment to George Maule into an ancient watercourse leading into the town street of Godmanchester, along part of the said town street and thence into the river Ouse;" and the commissioners did by their award direct (inter alia) "That all such drains and bridges shall be made and for ever maintained, supported, secured, and kept in repair by and under the directions of the surveyors of the highways, for the time being, of the said parish of Godmanchester, at the expense of all the proprietors of lands and grounds divided and inclosed by virtue of the said act in equal proportions."

4. This drain or watercourse is the one mentioned in the award of the arbitrator, and is known by the name of Stonehill Brook, and is the one in question in this mandamus.

5. Stonehill Brook is situate within the corporate borough of Godmanchester, a district within the meaning of the Public Health Acts, exclusively consisting of the whole of the corporate borough, within and for which the defendants are the local board of health under the said acts.

6. The following was the finding of the arbitrator:—The Stonehill Brook runs in the course which is delineated in the map annexed, commencing at the road called the London Road, and passing from thence through land called and known as the Dean and Chapter land, thence through land called Bleckley's farm, thence through land called Lady Olivia Sparrow's lands, thence through the lands of various proprietors, crossing a road called West Street, and terminating in the river Ouse. The whole length of its course between the London Road and the river Ouse is about one and a half mile. The water of Stonehill Brook, between the London Road and West Street, is solely supplied by the drainage, natural and artificial, of a considerable area of cultivated soil, but at West Street the drains of two or three inhabited houses empty themselves into the brook; and between

1866

THE QUEEN v. GODMANCHESTER LOCAL BOARD.

the West Street and the river Ouse the water of the brook stands at the level of that of the Ouse. With the exception of the drains at West Street just mentioned, no drains, other than the drains, under ground and open, of purely agricultural land discharge themselves into the brook. The channel of the brook is the natural channel of a certain natural stream, except so far as its character is altered by the facts next mentioned. The Inclosure Commissioners acting under the Local Inclosure Act, 43 Geo. 3, c. 3, between the years 1802 and 1809, cleared out the channel of the natural stream, and in various places along its course somewhat widened and deepened it, to render it more efficient as a means of draining a portion of the tract of land which was subject to the provisions of the act; afterwards the owner of Bleckley's farm, for greater convenience in subdividing his field, diverted the course of the natural stream by cutting for it an artificial channel, which commenced at the point where the natural stream entered Bleckley's farm from the Dean and Chapter's land, and which artificial channel, after running a length of about seven chains, re-entered the old channel, the intervening portion of the old channel being filled up and destroyed. For the same purpose, and about the same period, the owner of Lady Olivia Sparrow's lands also diverted the course of the natural stream by making for it an artificial channel, which commenced at the point where the said natural stream passed from Bleckley's farm to Lady Olivia Sparrow's land, and which artificial channel, after running a length of about eighteen chains, re-entered the old channel very nearly at the further boundary of Lady Olivia Sparrow's land, the old channel being partially filled up, but being left, and still remaining, capable of acting as an escape channel for surplus waters. The natural channel of the said natural stream, so altered and affected as just described, constitutes the existing channel of Stonehill Brook; the width of the channel of Stonehill Brook varies from about four feet at its upper extremity to about fifteen at its lower, and its depth from about three feet to about five feet between the same limits. Before the inclosure under the said Inclosure Act, Stonehill Brook was cleared out and repaired sometimes at the joint expense of all the owners of the land, subject to the provisions of that act, and sometimes by paupers of the parish of

Godmanchester, under the direction of the overseers of the poor of that parish for the time being, and paid by them out of the general poor-rates of the parish; but for the last thirty years, or thereabouts, it has been cleared out and repaired by the owners of the land through which it passes, each doing that portion of it which traverses his own land.

7. It is admitted that the drain, sewer, and watercourse, called Stonehill Brook, was and is in a foul and unclean and improper state and condition, so as to be a nuisance and injurious to health, as in the writ alleged.

8. It is also admitted that the drain, sewer, and water course, for want of being properly scoured, cleansed, emptied, and kept, had become and before and at the time in the writ mentioned and still is liable to overflow and damage, and then had overflowed and damaged the lands adjoining and near to the said drain, sewer, and watercourse, and the public way called Gravelly Way, as in the writ alleged.

The question for the opinion of the Court was, whether the prosecutor or the defendants is or are entitled to the verdict on the first and second pleas to the return to the writ. The verdict on these pleas is to be entered as the Court shall direct; it being agreed that the verdict is to be entered for the prosecutor on the third and fourth pleas to the return.

On the argument of the case, in Michaelmas Term, 1864, the Court of Queen's Bench was of opinion that the defendants were entitled to have the verdict entered for them on the first and second pleas, and directed the verdict to be entered accordingly; and the verdict by consent was entered for the prosecutor on the third and fourth pleas. (1)

*Keane, Q.C.* (*Douglas Brown* with him), for the prosecution. First, the Stonehill Brook is a sewer within the meaning of the Public Health Act, 1848, 11 & 12 Vict. c. 63. By the interpretation clause, section 2, "district" means "the entire area,.... comprised within the limits of any district to which the act is applied;" it must, therefore, necessarily include agricultural land; "drain" means "any drain used for the drainage of one

(1) See the report of the case in the court below; 34 L. J. (Q.B.) 13.

1866

THE QUEEN v. GODMANCHESTER LOCAL BOARD.

building only, .... and made merely for the purpose of communicating therefrom with a cesspool, &c., or with a sewer into which the drainage of two or more buildings occupied by different persons is conveyed;" and "sewer" means "sewers and drains of every description, except drains to which the word 'drain,' interpreted as aforesaid, applies." So that sewer clearly includes any kind of drain receiving the drainage of more than one house. This brook is therefore brought directly within the definition. Moreover, sewer, as generally understood, includes the means of drainage of agricultural land as well as of human habitations. In Callis, p. 80, authorities are cited to shew that "sewer is a fresh water trench compassed on both sides with a bank, and is a small current or little river." And at pp. 28—29, the object of the Statute of Sewers is stated. "Secondly, to provide that the great fresh rivers and streams may have their passages made clear, and their walls, banks, and other defences be repaired, kept, and maintained, whereby the fair, delightful, pleasant, and fruitful meadows and pasture grounds which lie in the greatest abundance upon or near the rivers, brooks, and streams, may be preserved from the inundation of fresh water, which many times annoys them, to the great inestimable damage of His Majesty's subjects, who be owners and farmers thereof." [He cited *Stracey* v. *Nelson* (1), and *Coulton* v. *Ambler*. (2)] If, then, this was a sewer, it was vested in the defendants by section 43 of the act, and by section 46 they were bound to cleanse it. Secondly, if this is a sewer, it does not come, as the other side contend, within the exceptions in section 43, for it is not "a sewer made by any person or persons for his or their own profit, or for the profit of proprietors or shareholders;" for "profit," in the first exception, must mean profit to be made out of the sewer itself, and does not refer to the land drained being made more profitable by the sewer. [He cited *Bear* v. *Bromley* (3); *Reg.* v. *Whitmarsh*. (4)] Nor is it "a sewer made or used for the purpose of draining or improving land under any local or private act of parliament." The Godmanchester act is an inclosure act; the kind of act contemplated by section 43 is a drainage act, like the 6 & 7 Vict.

(1) 12 M. & W. 535.
(2) 13 M. & W. 403.
(3) 18 Q. B. 271; 21 L. J. (Q. B.) 354.
(4) 15 Q. B. 600; 19 L. J. (Q. B.) 469.

c. lxxvi, clauses of which are given in a note to *Ostler* v. *Cook* (1); and this was not a sewer made under the act, but simply widened and deepened. The defendants also maintain that this brook is a watercourse set out by the commissioners in pursuance of the General Inclosure Act, 41 Geo. 3, c 109, s. 10, and is therefore to be kept in proper order, pursuant to that section, by the owners of the adjoining lands; but that section refers to private matters, and this is set out as a public drain or watercourse. The commissioners had no power to interfere with streams already formed, the limit of their power is pointed out in *Falmouth* v. *Richardson* (2) and *Paul* v. *James*. (3) Thirdly, whether this be a sewer or not, section 58 of the 11 & 12 Vict. c. 63, empowers the local board to cleanse all drains, ditches, and places, which are in a state to cause a nuisance injurious to health, and that is admitted to be the state of this brook.

*J. Brown, Q.C.* (*Metcalfe* with him), for the defendants. The effect of holding this brook to be a "sewer" within the meaning of the 11 & 12 Vict. c. 63, would be to throw the chief part of the burthen of cleansing it on to the householders; for by section 88 agricultural land is only to be assessed at one fourth the net annual value. But it is clear that this, which in fact is a natural stream slightly widened, and here and there diverted, and receiving the drainage of but two or three houses, is not a sewer within the meaning of the act. Possibly it might be a sewer within the meaning of that word as understood with relation to the old law of "commissions of sewers," but that is a much larger term: see Com. Dig. tit. Sewers (C. 1). The preamble of the present statute shews that the meaning is confined to the common acceptation of the word as a means of collecting drainage in towns and populous places. By the interpretation clause, s. 2, "drain" is confined to the drain of *one* house, and therefore "sewer" may well have the common meaning of a sewer in towns. Neither "stream" nor "watercourse" occurs in this section; but in s. 145, watercourse and stream are expressly exempted from the jurisdiction of the local board.

[ERLE, C.J., pointed out that s. 145 is repealed by s. 68 of the

(1) 18 Q. B. at pp. 839—840.

(2) 3 B. & C. 837. (3) 1 Q. B. 832.

1866

THE QUEEN v. GODMANCHESTER LOCAL BOARD.

21 & 22 Vict. c. 98; but intimated that it was unnecessary to hear further argument, as the Court were with the defendants on the first point.]

The third point made for the prosecution is not tenable; this mandamus commands the defendants at once to cleanse this brook as being vested in them; and the defendants are not brought by the allegations in the writ within s. 58, which only empowers a local board to cleanse a drain, &c., after notice and default in the owner or occupier of the land to abate the nuisance.

[ERLE, C.J. That is the view of the Court.]

*Keane, Q.C.*, was heard in reply.

ERLE, C.J. We all think that the judgment of the Court below ought to be affirmed; and we are inclined to agree with them in all the reasons assigned; but our judgment more particularly proceeds on the ground that the Stonehill Brook was not a "sewer" within the meaning of the Public Health Act, 11 & 12 Vict. c. 63. The definition of sewer is not precise; but we think the act ought to be construed with reference to the preamble, and thus giving force to the enactments, we think that the brook, which is formed by the natural drainage of the fields in the neighbourhood, and after receiving the drainage of two houses makes its way into the river Ouse, is not a "sewer" within the meaning of the statute.

With reference to the second point made by Mr. Keane, that this, if a sewer, does not come within the second exception of section 43, not being made by the Inclosure Commissioners, if need were, we should be inclined to agree with the Court below; but we do not think it necessary to go into that, because on the first point we are against the prosecutor.

There was a third point, made by Mr. Keane, which weighed considerably with me, that this brook was in a state that would be a nuisance to the neighbourhood, according to the admission in the case, and that section 58 provided a remedy for the removal of such a nuisance. But we cannot give judgment for the prosecutor on this mandamus under the 58th section, because that section does not impose directly on the local board the duty of removing such a nuisance, but only conditionally; that is, it com-

mands them, where the nuisance exists, to give notice to the owner or occupier of the property in which it is that that nuisance does exist, and that he must remove it; and upon the failure of the person to whom the notice has been given to comply with it, the board are then to interfere, and take measures to remove the nuisance, and they have power to call upon the party disobeying to pay the expense; but that duty is not within the command of this mandamus, which calls on the local board to remove the nuisance at once. We therefore think that the judgment should be also for the defendants on that point, and that the judgment of the Court below should be affirmed.

POLLOCK, C.B., WILLES, KEATING, and MONTAGUE SMITH, JJ., and PIGOTT, B., concurred.

*Judgment affirmed.*

Attorneys for prosecution: *Fox & Meadows.*
Attorney for defendants: *R. H. Peacock.*

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IN THE MATTER OF BALLS *v.* THE METROPOLITAN BOARD OF WORKS.

*Jan.* 29.

*Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *ss.* 51 & 68—*Lands injuriously affected—Compensation—Amount offered—Costs.*

An offer of compensation, in respect of lands injuriously affected by the execution of works within section 68 of the Lands Clauses Consolidation Act, 1845, must be an unconditional offer of compensation for the injury done, and is bad if it be an offer of one sum for compensation and costs.

Where, therefore, an offer was made of 100*l.* in full satisfaction for all injury sustained, and for all costs and charges incidental to the claim, and on the inquiry the jury found the amount of injury to be 75*l.*:—

*Held*, that the offer was bad, and that the claimant was entitled to his costs under section 51, notwithstanding the amount of the verdict was for a sum less than the offer.

*Quære*, whether a sum offered as compensation under section 68, after the costs of nominating a special jury have been incurred, and before a notice of the inquiry is given under section 46, is "a sum previously offered," within section 51.

ON the 7th of November, William Balls sent to the Metropolitan Board of Works a notice in writing, under section 68 of the Lands Clauses Consolidation Act, which is incorporated in the Metropolis

1866

BALLS v. METROPOLITAN BOARD OF WORKS.

Local Management Act, 1855 (18 & 19 Vict. c. 120), by section 151 of the latter act, claiming the sum of 400*l.* as compensation in respect of alleged injuries to his freehold house, buildings, and land, situate at Brunton's Place, Commercial Road, East, caused by certain works connected with the drainage of the metropolis, whereby his house, buildings, and land, had been injuriously affected; and also in respect of his interest in that part of his land which had been taken for the execution of such works, and he required the board, if they declined to pay the amount claimed, or to enter into a written agreement for that purpose within twenty-one days after the receipt of the notice, to have the amount of compensation settled by a special jury. The board declined to pay the amount claimed, or to enter into an agreement for its payment, and on the 24th of November issued their warrant to the sheriff of Middlesex to summon a special jury in accordance with the claimant's notice. The warrant was deposited with the sheriff on the 27th of November. On the 28th of November the sheriff served on the attorneys of the respective parties a summons, appointing the 4th of December as the day to nominate a special jury in pursuance of the warrant, and on that day the special jury was nominated. On the same day, after the special jury had been nominated, a notice was served on behalf of the board on the claimant and his attorneys, which, after stating that the Metropolitan Board of Works were willing to purchase the claimant's estate and interest in the house and buildings situate at Commercial Road, East, at a price to be agreed upon by two competent surveyors, one to be named by each party, or in the event of their being unable to agree, then at a sum to be fixed by a competent surveyor, to be nominated by them, and further stating that if the claimant declined to sell his estate the board were willing to repair and make good the damage occasioned by their works, proceeded: "If you decline to sell your estate and interest, or to allow the Metropolitan Board of Works to repair the premises, then, under the provisions of the Metropolis Local Management Act, 1855, and the several acts amending the same, relative to the drainage of the metropolis, the Metropolitan Board of Works are ready and willing to pay to you the sum of 100*l.* in full satisfaction and discharge of

all claims and demands of what kind or nature soever, on account of any damage or injury sustained by you through their works in your notice mentioned, such sum to include all costs, charges, and expenses of, occasioned by, or incidental to, your claim, or the proceedings to enforce the same." Together with this notice, a notice in writing that the inquiry would be held at the sheriff's office, 24, Red Lion Square, on the 15th of December, was served on behalf of the board on the claimant. On that day the inquiry was held, and the damages were assessed by the jury at the sum of 75*l.*

On the 6th of January, 1866, an application was made to a master of this court on behalf of the claimant, under section 52 of the Lands Clauses Consolidation Act, to tax his costs of the inquiry. On the hearing of the application before the master, it was contended on behalf of the board that the claimant was not entitled to his costs, under section 51, by reason of the jury having given a verdict for a less sum than the sum previously offered by the board. It was contended on behalf of the claimant that the sum of 100*l.* was not a "sum previously offered" within the meaning of section 51, and that the offer by the board ought to have been made before the notice of the time and place of holding the inquiry was served, and that by the board attending to nominate the special jury the litigation had begun before the offer was made. It was also contended that the offer of the board was bad for stating that the sum offered was to include all the costs of the claimant in respect of his claim.

The master decided that the claimant was entitled to his costs, and taxed them at 15*l.*

*Montagu Chambers, Q.C.*, obtained a rule, upon an affidavit disclosing the above facts, calling upon the claimant to shew cause why the master's allocatur should not be set aside, or why the master should not review his taxation.

*Tindal Atkinson, Serj.*, and *Shaw*, shewed cause. The claimant is entitled to his costs on two grounds: First, because the sum of 100*l.* offered as compensation is not a sum "previously offered" within the meaning of section 51 of the Lands Clauses Consolidation Act; and, secondly, because the offer is bad, as it includes

1866

BALLS v. METROPOLITAN BOARD OF WORKS.

all the costs, charges, and expenses occasioned by the claim. With regard to the first point. This is a proceeding under section 68 of the Lands Clauses Consolidation Act, with which section 51 is incorporated. (1) The offer of compensation was made by the board on the day the notice of the inquiry was given, and after a special jury had been nominated, and, therefore, after the expenses of nominating the special jury were incurred. If this had been the case of an inquiry before a common jury, the claimant would have incurred no costs; and an offer made ten days previous to the inquiry would be made within a reasonable time, and would be an offer previously made within section 51. But the case of an inquiry before a special jury is different: the notice of the inquiry is necessarily subsequent to the time of nominating the special jury; and an offer cannot be said to be made within a reasonable time if it is made after expenses have been incurred in proceeding with the inquiry. In the cases of *Metropolitan Railway Company* v. *Turnham* (2) and *Hayward* v. *Metropolitan Railway Company* (3), the Court of Common Pleas and this Court held that, if the offer was made previous to the ten days notice of inquiry required by section 46, it was an offer previously made within section 51; but in both those cases the offer was made before the special jury had been nominated, so that the claimant had incurred no costs. Secondly, the offer is bad. It is an offer of 100*l.* for compensation and costs; it is impossible to say how much is for compensation and how much for costs. The offer ought to be made without any condition, and ought to be for compensation only, and similar in terms to an offer under section 38. The offer being tantamount to no offer, the claimant is entitled to his costs by section 51.

*Montagu Chambers, Q.C.*, and *Raymond*, in support of the rule, were directed by the Court to confine their argument to the second point. The object of the offer is to fix a sum upon which the verdict of the jury is to operate. If the verdict is not for more than the sum offered, the claimant has no costs under section 51. The jury have no power to take the amount of costs into consideration; the

(1) See *South Eastern Railway Company* v. *Richardson*, 15 C. B. 810; 21 L. J. (C.P.) 122.

(2) 14 C. B. (N.S.) 212; 32 L. J. (M.C.) 249.

(3) 4 B. & S. 787; 33 L. J. (Q.B.) 73.

1866

BALLS v. METROPOLITAN BOARD OF WORKS.

condition as to costs is, therefore, merely surplusage. In an action, the costs are incurred de die in diem, but here they cannot be ascertained until after the inquiry; and at the time the offer is made the claimant is not entitled to costs. If the notice had said nothing about costs, the claimant would have been in no different position: he has to consider whether the offer of compensation is sufficient, and he refuses it at his peril; that is a risk he runs. He was offered 100*l.*, and the jury gave him 75*l.*; he is consequently entitled to no costs by section 51.

COCKBURN, C.J. I am of opinion that this rule ought to be discharged. I think it very doubtful whether the offer was made in time. The case having gone on, if the jury had found an amount of compensation beyond that offered by the board, the expenses incurred by the claimant in nominating the special jury would have been included in the costs of the inquiry to which he would have been entitled; but as the costs of nominating a special jury had been already incurred between the parties when the offer was made, I doubt whether the offer was not too late. It is not necessary to decide this case on that point. The offer is coupled with a condition that the claimant should accept the 100*l.* in payment of costs, as well as for compensation. What the statute requires is, that a reasonable compensation should be offered by the promoters of an undertaking for the damage they may have done, entailing certain consequences, in the event of the inquiry proceeding, if the claimant declines to accept the sum offered. The offer must, therefore, be simply of a sum for compensation, and cannot, I think, be made to embrace anything beyond it. The board were not justified in putting a condition on the claimant; the offer is therefore bad.

BLACKBURN, J. The offer of compensation is to be an offer which the claimant can either accept or reject; if it is of one sum for compensation and costs, the claimant cannot know how much he is to have for the injury to his land and how much for his costs. He might therefore be misled by it. The offer required by the statute must be a plain and unconditional offer of compensation for injury to the land. It is not necessary to decide whether the offer was made in time or not.

1866

BALLS v. METROPOLITAN BOARD OF WORKS.

LUSH, J. I am of the same opinion. The offer is bad, whether it were made in time or not, because the offer is of one lump sum including compensation and costs, and with the costs the jury have nothing to do. It is impossible to say how much is offered by way of compensation, and how much for costs. Whether the offer was made in time is a difficult question, which it is not necessary to decide. I am inclined to think it ought to have been made before the claimant had incurred any costs.

*Rule discharged.* (1)

Attorneys for claimant: *Dalton & Hill.*
Attorneys for the board: *N. Lindo & Sons.*

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*Jan.* 30.

IN THE MATTER OF COBB *v.* THE MID WALES RAILWAY COMPANY.

*Lands Clauses Consolidation Act*, 1845 (8 *Vict.* c. 18) *ss.* 51, 94—*Severed land*—*Communication*—*Costs of inquiry under section* 94—*Railway company.*

A piece of land being severed by a railway from other land of the same owner, he required the company to make him a communication between the two, on which the company required him, under section 94 of the Lands Clauses Consolidation Act, 1845, to sell them the severed land as being of less value than the expense of making the communication. An inquiry then took place before a jury pursuant to that section, which enacts that "any dispute as to the value of the severed land, or as to what would be the cost of making the communication, shall be ascertained as in the act provided for cases of disputed compensation." The jury found the land of less value than the cost of the communication. The company had made no offer for the land previous to the inquiry; and the landowner claimed his costs under section 51:—

*Held*, that section 51 was not incorporated with section 94, and that the landowner was not entitled to his costs of the inquiry.

THE Mid Wales Railway Company were incorporated by their act of 1859 (22 & 23 Vict. c. lxiii). For the purposes of constructing their line, they required to take certain lands situate in the parish of Llanfihangel Talyllynn, in the county of Brecon, belonging to Messrs. Lewis and Meredith. The company accordingly purchased of them about three quarters of an acre of land. During the period of the construction of the line, or since its

(1) See the next case.

completion, Mr. J. R. Cobb purchased the remaining portion of Messrs. Lewis and Meredith's lands.

The lands so purchased by Mr. Cobb, consisting of two pieces, were severed one from the other by the line of railway, and were entirely isolated as a distinct property (being surrounded by lands of other owners); the only access to them from the public road was by means of the old Hereford, Hay, and Brecon tramway. The company having purchased this tramway had incorporated it into their railway, and thus the access to the two pieces of land purchased by Mr. Cobb was destroyed.

Mr. Cobb accordingly gave notice to the company, in pursuance of the 68th section of the Railways Clauses Consolidation Act, 1845, 8 Vict. c. 20, requiring them to give him means of access to his land, and also means of communication under the railway by means of an arch or tunnel from one piece of his land to the other.

The company not having complied with this notice, Mr. Cobb applied for and obtained an order of justices, under s. 69, by which the company were directed to make such communication.

The company, considering that the value of the land (which was more than half an acre), to which communication was required to be made, was less than the expense of making the communication, gave a notice to Mr. Cobb, which, after reciting the above facts and section 94 of the Lands Clauses Consolidation Act. (8 Vict. c. 18), concluded:—"Now, therefore, the Mid Wales Company give you notice, that if you require the company to make such arch, tunnel, or communication, the company will require you to sell to them such piece of land so severed and intersected; and if, after the expiration of ten days from the service of this notice on you, you fail to agree with the company as to the sale of such piece of land, and any dispute as to the value of the same, or as to what would be the expense of making such arch, tunnel, or communication so directed to be made, or you fail to satisfy the company that you have other lands adjoining such piece of land, then the company will, in pursuance of the statute in such case made and provided, proceed to have the value of such severed piece of land, and also what would be the expense of making such arch, tunnel, or communication ascertained, in accordance with the provisions of the statutes in that case made and provided."

1866

COBB v. MID WALES RAILWAY CO.

Fourteen days after the service of the notice on Mr. Cobb, he sent to the secretary of the company the following notice:

"To the Mid Wales Railway Company.

"Referring to your notice, under the hand of your secretary, dated the 11th July, 1865, and directed to me and Mr. David Morris, my tenant (and without prejudice to my right at any time to contend that the 94th section of the Lands Clauses Consolidation Act, 1845, therein referred to, has no application in the present case, and that you are bound to make such arch, tunnel, or communication described in your notice as directed, and that you have no such right as you claim under the said notice), I hereby give you notice, that I do require you to make such arch, tunnel, or communication, that I am not willing to sell to you the piece of land, or any other land or hereditaments belonging to me, and to which access will be given by the said arch, tunnel, or communication.

"That I do not admit that the land and hereditaments are of less value than the expense of making such arch, tunnel, or communication, and I therefore require you, but, nevertheless, without prejudice as aforesaid, to proceed without delay to have the question determined whether or not the said land and hereditaments are of less value than the expense of making such arch, tunnel, or communication, and forthwith to issue your warrant to the sheriff of the county of Brecon, or other the proper officer in that behalf, to summon a jury for ascertaining and determining the said question. And further take notice, that if you do not proceed with all due despatch in the premises, I shall avail myself of the provisions of section 70 of the Railways Clauses Consolidation Act, 1845, and shall proceed myself to execute the works ordered by the order of the justices."

In pursuance of Mr. Cobb's notice, the company issued their warrant to the sheriff of the county of Brecon, requiring him to summon a jury for the purpose of determining the question in the manner and form required by Mr. Cobb.

The inquiry was held as required by Mr. Cobb (the company deeming it advisable to summon a special jury), and the jury by their verdict found that the land required to be purchased by the company of Mr. Cobb was of less value than the expense of making the communication, and they assessed the land at 150*l.* per acre,

being equal to 268*l.* 1*s.* 6*d.* for the whole land required to be taken, and the cost of making the communication at 300*l.*

Mr. Cobb afterwards submitted his bill of costs of the inquiry for taxation to a master of the court, under s. 52 of the Lands Clauses Consolidation Act. The master refused to tax, on an understanding between the parties that the opinion of the Court should be taken on a rule to review his refusal.

*Tindal Atkinson, Serjt.*, moved accordingly that the master might be directed to tax Mr. Cobb his costs. Mr. Cobb is entitled to costs. Section 94 of the 8 Vict. c. 18 (1), directs that an inquiry under that section shall be made in the manner provided for cases of disputed compensation. Section 43 says that when the inquiry is before a jury the claimant shall be deemed plaintiff, and shall have all the rights and privileges of a plaintiff in an action at law.

[BLACKBURN, J. Section 51 (2) regulates the right to costs,

(1) 8 Vict. c. 18, s. 94: "If any land shall be so cut through and divided as to leave on either side of the works a piece of land of less extent than half a statute acre, or of less value than the expense of making a bridge, culvert, or such other communication between the land so divided as the promoters of the undertaking are, under the provisions of this or the special act, or any act incorporated therewith, compellable to make; and if the owner of such lands have not other lands adjoining such piece of land, and require the promoters of the undertaking to make such communication, then the promoters of the undertaking may require such owner to sell to them such piece of land; and any dispute as to the value of such piece of land, or as to what would be the expense of making such communication, shall be ascertained as herein provided for cases of disputed compensation; and on the occasion of ascertaining the value of the land required to be taken for the purposes of the works, the jury, or the arbitrators, as the case may be, shall, if required by either party, ascertain by their verdict or award the value of any such severed piece of land, and also what would be the expense of making such communication."

(2) 8 Vict. c. 18, s. 51: "On every such inquiry before a jury, where the verdict of the jury shall be given for a greater sum than the sum previously offered by the promoters of the undertaking, all the costs of such inquiry shall be borne by the promoters of the undertaking; but if the verdict of the jury be given for the same or a less sum than the sum previously offered by the promoters of the undertaking, or if the owner of the lands shall have failed to appear at the time and place appointed for the inquiry, having received due notice thereof, one half of the costs of summoning, impannelling, and returning the jury, and of taking the inquiry, and recording the verdict and judgment thereon, in case such verdict shall be taken, shall be defrayed by the owner of the lands, and the other half by the

1866

COBB v. MID WALES RAILWAY CO.

and enacts that when the verdict shall be for a greater sum than that previously offered, all the costs of the inquiry shall be borne by the promoters; but if the verdict be for the same, or a less sum than that offered, then each party shall pay their own costs. The question is, whether this section is incorporated with section 94.]

Here there was no offer, which is equivalent to a less offer. *South Eastern Railway Company* v. *Richardson* (1) decided that section 51 is incorporated with the 68th section, and the words of reference by which the Court held it incorporated are certainly not larger than the terms used in the 94th section. Coleridge, J., in *Railstone* v. *York, Newcastle, and Berwick Railway Company* (2) points out that the whole series of sections apply.

*Rule nisi.*

*Karslake, Q.C.*, and *Littler*, shewed cause in the first instance. Coleridge, J., in *Railstone* v. *York, Newcastle, and Berwick Railway Company* (2), is only referring to the incorporation of the previous sections with section 68, which is the last of the series as to compensation. But section 68 has reference to a very different state of things to that under section 94. The dispute under the latter section is as to whether or not the company have a right to take the land, or whether they are to make the communication, and the value of the land only comes collaterally in question; *South Eastern Railway Company* v. *Richardson* (1) has, therefore, no direct bearing on the present case; and the majority of the Court in *Railstone* v. *York, Newcastle, and Berwick Railway Company* (2), held that section 38 was not incorporated with section 68, because it had no direct bearing on the matter; and that case was upheld in *Hayward* v. *Metropolitan Railway Company* (3), and was not overruled by the Exchequer Chamber in *South Eastern Railway Company* v. *Richardson* (1), although doubts

promoters of the undertaking, and each party shall bear his own costs, other than as aforesaid, incident to such inquiry."

(1) 15 C. B. 810; 21 L. J. (C.P.) 122.

(2) 15 Q. B. at p. 415; 19 L. J. (Q.B.) at p. 468.

(3) 33 L. J. (Q. B.) 73; 4 B. & S. 787.

had been thrown upon it by the court of Common Pleas. (1) In *Corrigal* v. *London and Blackwall Railway Company* (2), under two special acts in very similar circumstances to the present, the Court held that a section of the first giving costs was not applicable to proceedings under the second, as the events were not precisely what the section giving costs contemplated. In *Reg.* v. *Biram* (3), the events were held divisible. But under section 94 no offer which the company could make would supersede the necessity of an inquiry, if the landowner still refused to sell the land. In a case of disputed compensation simply, an offer has a direct bearing on the subject matter, and if the offer of the company be less than the amount awarded, it is but just that the company, who have forced the claimant to an inquiry, should pay his costs. But under section 94, however large the offer of the company, if the jury found the cost of making the communication less than the value of the land, the company would be wrong in the result of the inquiry; on the other hand, although the offer were less than the value of the land found by the jury, yet if that value were less than the cost of making the communication, the company would have been right in the result. There is no event therefore such as is contemplated by section 51. The question of costs has been overlooked by the legislature.

*Tindal Atkinson, Serjt.*, in support of the rule. Although *Railstone* v. *York, Newcastle, and Berwick Railway Company* (4) decides that section 38 is not incorporated in section 68; yet an offer could be made, and this is what section 51 must be understood to refer to, as Blackburn, J. points out in *Hayward* v. *Metropolitan Railway Company*. (5)

[MELLOR, J. Section 94 incorporates the machinery of an inquiry as to disputed compensation; is the result as to costs part of it?]

If the company might make an offer, why should their not doing it be visited with costs just as much as in the other cases? The company must take care to put themselves right by making

(1) See 11 C. B. 154; 20 L. J. (CP.) 236.
(2) 5 M. & G. 219.
(3) 17 Q. B. 969.
(4) 15 Q. B. 404; 19 L. J. (Q.B.) 464.
(5) 33 L. J. (Q.B.) 73; 4 B. & S. 787.

1866

COBB v. MID WALES RAILWAY CO.

an adequate offer. There is no hardship in this, as they demand the land, and so force on the inquiry.

COCKBURN, C.J. I have come to the conclusion that the rule must be discharged. No doubt the 94th section does contain a provision that an inquiry under it as to the value of the land and cost of communication shall be conducted and the result ascertained as in cases of disputed compensation; and no doubt in a case of disputed compensation, unless the company made an offer as large as the sum awarded, the landowner has his costs, and if the company made no offer, the same result follows; so that in the present case, as the company are entitled to take the land at the value found, being less than the cost of the communication, if the whole of the enactments as to disputed compensation are to apply, it follows that the company are bound to pay the costs of the inquiry by reason of their not having made any previous offer. But on looking more closely at the 94th section, the only conclusion that we can come to, in my opinion, is that this is a *casus omissus*, and the framer of this section had not present in his mind the whole of the enactments applicable to the ordinary cases of disputed compensation, nor the requirements and preliminaries which must exist in order to give the claimant costs, or to entitle the company to be free from them.

In cases like the present there are two branches of inquiry. First, whether the expense of making the required communication is greater than the value of the land; and as soon as that is ascertained to be the case the company are entitled to take the land; and then the second branch of the inquiry arises, and it becomes a question of the compensation to be paid. Now, if there were two separate inquiries, the first branch would not be matter of compensation at all; and the second, being separate, would be a pure question of compensation, and the other enactments as to costs might apply, for there would be such an event as is contemplated by them. The value of the land here was found to be less than the expense of making the communication, so that the subsequent question arose. But suppose the jury had found the land of more value than the expense of the communication; in that case the question of compensation could not arise at all, and if an

offer had been made by the company it could have no operation in regulating the right to costs, because the right to costs or the exemption from paying costs only arises in the event of the offer of the company being less or more than the sum awarded for compensation. So that if costs are to be given at all, in the present case they would follow, but not in the case supposed. I cannot suppose the legislature contemplated such a state of things. In truth, the machinery of the 51st section as to costs is not applicable; and, therefore, the present case as to costs is a *casus omissus*; and it is not competent to us to supply the omission.

BLACKBURN, J. I have come to the same conclusion, but with considerable doubt. I consider that we must treat this as a *casus omissus*, and that costs are not provided for at all; for costs are not to be given unless the intention of the legislature is clear. The matter turns entirely on the construction of the 94th section. [The learned judge read the section.] The main question is the right to purchase the land, and that depends on whether the expense of making the required communication exceeds the real value of the land. If the parties are agreed that the expense is more than the value of the land, then the only question is the amount to be paid for it; and the company in such case could very well make an offer, and if it were not accepted, and an inquiry became necessary, the determination of the question in issue might well determine the right to costs. But when the parties are not agreed as to the relative cost of the land and of the communication, no offer which the company can make can determine the question or give the company the right to purchase. If the offer be ten times the real value of the land the owner is not bound to sell, unless the cost of making the communication be in fact more than the real value of the land. So that no offer can supersede the necessity of an inquiry. If the company were to offer 1000*l.*, and the jury found the value of the land 100*l.*, but the cost of the communication only 10*l.*, the company would be in the wrong, though the offer were more than the value of the land, and yet as the amount of offer must regulate the right, if any, to costs, the company, though in the wrong, would be free from costs. Section 94 says: "Any dispute as to the value of the piece of land or the expense of making the communication shall be

1866

COBB v. MID WALES RAILWAY CO.

ascertained as herein provided for cases of disputed compensation." Now, there are a great many clauses clearly applicable, the clauses as to the mode of proceeding by arbitration or before a jury. But the clauses, sections 34 and 51, as to costs, in both cases make the right of the claimant to costs to depend on the amount of the previous offer being less than the sum awarded. There is a provision in section 38 for making an offer; but under section 68, which applies to an inquiry as to lands injuriously affected, there is no obligation upon the promoters to make a previous offer; but they can make an offer which may possibly be accepted by the claimant; and it has been held that section 51 as to costs is to be taken as incorporated with section 68. (1) This is perhaps a little straining the statute; but the decision is reasonable enough, as the promoters had it in their power to make an offer which might possibly supersede the necessity of any inquiry. But the same reasoning does not apply when we are asked to incorporate section 51 with section 94, a section under which costs cannot properly depend upon an offer, inasmuch as no offer can supersede the necessity of an inquiry when the parties are not agreed as to the relative cost of the land and the approach. The legislature have not expressly said what is to be done in such a case as to costs; and it cannot be inferred that they intended to saddle the promoters in all cases with costs. Each party, therefore, must bear their own costs. There may be hardships in particular cases, but we cannot legislate.

MELLOR, J. I am of the same opinion. It certainly appears to me extremely difficult to expound the 94th section, as to ascertaining the expense of the communication and the value of the land, in such a way as to incorporate the sections as to costs, so as to make them depend upon the result of the inquiry. From the very nature of the inquiry no offer that could be made would have the effect of protecting the company from costs; and it may well be that the legislature intentionally omitted all direct reference to costs, meaning both parties in all cases, under section 94,

(1) See *Richardson* v. *South Eastern Railway Company*, 11 C. B. 154; 20 L. J. (C.P.) 236; S. C. in error, 15 C. B. 810; 21 L. J. (C.P.) 122; and *Hayward* v. *Metropolitan Railway Company*, 33 L. J. (Q.B.) 73; 4 B. & S. 787.

to pay their own costs. But taking the words of the section, it only says, in not very apposite language, that the value and cost of the land and the communication are to be ascertained as in cases of disputed compensation, and the mode of ascertaining certainly would not necessarily include the result as to costs; so that, I think, we must hold that the sections as to costs are not incorporated. The inquiry under the 94th section is wholly collateral to the value of the land or the injury by severance. This very dispute did not arise till two years after the company had bought the other land, and not till the land had passed into the hands of a new owner. Under section 68 the inquiry is as to the amount of compensation simpliciter, and it is a very reasonable construction that the intention of the legislature was that, in such an inquiry, all the results as to costs should follow. But this inquiry is very different; and it would be very hard on a company if, having paid for severence, they should long afterwards be called upon by any new owner to make a new communication, and on their declining to do that, they should have to pay costs in addition. As to the hardship, possibly in some cases the balance may be against the landowner. But it is sufficient to say that I cannot see a clear intention to incorporate the sections as to costs, which certainly are not directly applicable. There is great difficulty in the matter, but costs cannot be given except an intention can clearly be implied.

*Rule discharged.* (1)

Attorneys for claimant: *Dobinson & Geare.*
Attorney for the company: *S. F. Noyes.*

(1) See the preceding case.

1866
Feb. 1.

WILLIAMS and Others *v.* EVANS.

*Principal and agent—Sale by auction—Payment to auctioneer by bill of exchange.*

An auctioneer, who is authorized to sell goods on the conditions that purchasers shall pay a deposit at once and the remainder of the purchase money to the auctioneer on or before delivery of the goods, has no authority to receive payment by a bill of exchange; and such payment will not discharge the purchaser.

Declaration for goods sold and delivered, and for money due on accounts stated.

The only material plea was payment, on which issue was joined.

The cause was tried before Shee, J., at the Carmarthenshire summer assizes, when it appeared that the action was brought to recover the sum of 47*l.* 7*s.*, under the following circumstances. The plaintiffs employed one Edward Leyshon, an auctioneer, to sell certain goods on the following amongst other conditions: "Each purchaser to furnish his or her name and residence, and to pay down into the hands of the auctioneer, or Mr. G. Griffiths, the clerk of the sale, a deposit of 5*s.* in the pound in part payment of each lot; remainder or balance to be paid on or before delivery of the goods or lots purchased. The lots sold will be at the purchaser's risk from the fall of the hammer, and must be taken away with all faults and errors of any description, and be duly paid for on delivery to the auctioneer or clerk. The goods may remain on the premises till Thursday evening, the 3rd of November, 1864." The sale took place on the 2nd of November, 1864, at which one Harris purchased some malt, but owing to his not having complied with the conditions of sale, it was on the 4th of November resold to the defendant for 47*l.* 7*s.*, on the terms contained in the conditions of sale. The malt was delivered to the defendant on the 7th of November. On that day the plaintiffs, having reason to doubt Leyshon's solvency, had told the defendant not to pay any money to Leyshon. The evidence on the part of the defendant was, that he had paid Leyshon 32*l.* in gold on the 4th of November, and 15*l.* 7*s.* on the 5th of November by a bill of exchange accepted by a third person, which was duly honoured on the 9th of November; and that Leyshon had agreed

to receive the bill as cash. Leyshon had not paid over any of the purchase money to the plaintiffs.

The learned judge directed the jury, if they believed that the payments of 32*l.* in gold, and 15*l.* 7*s.* by bill, were made before the 7th of November, to find their verdict for the defendant. The jury found their verdict for the defendant. The learned judge then reserved leave to the plaintiffs to move to enter a verdict for 15*l.* 7*s.*, on the ground that Leyshon the auctioneer, had no authority to give credit to a purchaser at the sale.

*H. S. Giffard, Q.C.*, obtained a rule nisi accordingly.

*J. W. Bowen* shewed cause. Under the conditions of sale the auctioneer was authorized to receive payment for the things sold. The defendant paid the auctioneer before the authority to receive payment was revoked; it is true he paid him by a bill of exchange, but the auctioneer received it as cash, and the bill was ultimately paid. The plaintiffs are in no way prejudiced by the auctioneer having received the bill as payment. Suppose instead of a bill of exchange, the auctioneer had taken a cheque, could it be said that he was not authorized to receive payment by cheque? The defendant was under an obligation to pay the auctioneer; if he paid the principal, he would still be liable to the auctioneer: *Robinson* v. *Rutter*. (1) No doubt the other side will rely upon the dicta to be found in *Sykes* v. *Giles* (2), but that case is distinguishable; there the auctioneer was never authorized to receive payment, he had only authority to receive the deposit, and the vendor had reserved to himself the power to receive the remainder of the purchase money.

*H. S. Giffard, Q.C.*, and *H. G. Allen*, in support of the rule. *Sykes* v. *Giles* (2) is decisive of this case. No doubt there the auctioneer had no authority to receive the purchase money, but he did receive payment of it by a bill of exchange. Lord Abinger in his judgment, says the auctioneer "had no authority to receive the money, and most clearly not to take the bill of exchange." Parke, B., likewise expresses a similar opinion; he says, the "auctioneer has no authority to receive payment by means of a bill of exchange." In the present case the auctioneer, by the con-

(1) 4 E. & B. 954; 24 L. J. (Q.B.) 250. (2) 5 M. & W. 645.

1866

WILLIAMS v. EVANS.

ditions of sale, is authorized to receive payment, but that means to receive payment in cash. He cannot, by taking a bill of exchange suspend the right of the principal to recover his debt against the vendee. The auctioneer can generally only sell for ready money, and he cannot give credit. If an agent has authority to receive money which he has to pay over to his principal, he is bound to receive payment in such a way as will enable him to discharge his duty, and the person who pays such an agent must see that the mode of payment does enable the agent to discharge his duty: *Barker* v. *Greenwood*. (1) It is laid down in Story on Agency, sect. 98: "An agent authorized to receive payment has not an unlimited authority to receive it in any mode which he may choose, but he is ordinarily deemed entrusted with a power to receive it in money only." The auctioneer, therefore, had no authority to receive payment by means of a bill of exchange, and the defendant is liable to pay the amount to the plaintiffs.

BLACKBURN, J. The question on the point reserved at the trial is, whether or not a payment to an auctioneer by a bill of exchange is a valid payment. I think, on the authorities, it is not. If the bill had become due and been paid before the authority of the auctioneer to receive payment had been revoked, it would have amounted to much the same thing as cash. In the present case, the authority was revoked after the bill was given, but before maturity; that is, before the auctioneer received cash for the sum of 15*l*. 7*s*. The passage cited from Story shows that an agent authorized to receive payment has ordinarily authority to receive it only in cash. In *Sykes* v. *Giles* (2) the Court of Exchequer expressed a strong opinion that an auctioneer cannot receive payment from a buyer except in cash. If the payment had been by cheque, then it might be a question for the jury—since it is the custom to pay by cheques—whether the payment would be good or not. In *Thorold* v. *Smith* (3), where a payment was made in the city by a goldsmith's note to a servant sent by his master to receive money, Holt, C.J., said he thought it more a matter of evidence than of law, and any jury in Guildhall would find pay-

(1) 2 Y. & C. Ex. 414. (2) 5 M. & W. 645.
(3) 11 Mod. 87.

ment by a bill to be a good payment, it being the common practice in the city. I think, on the authority of *Sykes* v. *Giles* (1), payment by a bill of exchange to an auctioneer is not a valid payment for the purpose of discharging the debtor, and the verdict must therefore be entered for the plaintiffs for 15*l.* 7*s.*

MELLOR and SHEE, JJ., concurred.

*Rule absolute.*

Attorney for plaintiffs: *Spaull.*

Attorneys for defendant: *Bridges & Co.*

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KEMP *v.* WADDINGHAM AND ANOTHER, ADMINISTRATORS, &c.

*Feb.* 2.

*Judgment debt—Registration—Preference in the Administration of Assets—23 & 24 Vict. c. 38, s. 3.*

A judgment, signed in 1854, but not registered until after the death of the debtor, which happened after the passing of the 23 & 24 Vict. c. 38, is, by section 3, not entitled to preference in the administration of the debtor's estate.

DECLARATION on a writ of revivor sued out on the 17th of April, 1863, against the defendants as administrators, on a judgment recovered on the 29th of June, 1854, against Thomas Waddingham, deceased, for 204*l.*

Plea, That the defendants had fully administered.

The cause was tried before Erle, C.J., at the last Cambridgeshire summer assizes. The defendants are the administrators of Thomas Waddingham, who died on the 14th of November, 1862, intestate. The plaintiff signed judgment against him on the 29th of June, 1854, but did not register it until the 25th of February, 1863. The plaintiff proved assets in the hands of the defendants to the amount of 189*l.* The defendants proved that they had paid simple contract debts to the amount of 233*l.* It was contended on behalf of the plaintiff that notwithstanding section 3 of the 23 & 24 Vict. c. 38, and the fact that the judgment was not registered until after the death of the intestate, the judgment debt was entitled to priority. The Chief Justice

(1) 5 M. & W. 645.

1866

KEMP v. WADDINGHAM.

directed a verdict to be entered for the defendants, reserving leave to move to enter a verdict for the plaintiff, if the Court should be of opinion that the plaintiff's debt was entitled to priority over the debts paid by the defendants.

*O'Malley, Q.C.*, obtained a rule nisi accordingly.

*Keane, Q.C.*, and *Douglas Brown*, shewed cause. The 23 & 24 Vict. c. 38, was passed in 1860; the intestate died in 1862, and the judgment was registered in 1863. The question is, upon these facts, is the judgment debt entitled to priority over simple contract debts in the administration of the intestate's estate? Section 3 of the 23 & 24 Vict. c. 38, enacts that no judgment which has not already been or which shall not hereafter be entered and docketed so as to bind lands as against purchasers, shall have any preference against heirs, executors, and administrators in their administration of their ancestor's, testator's, or intestate's estates. The intention of the legislature in passing this act was to give executors and administrators the same protection against unregistered judgments as they enjoyed under the 4 & 5 Wm. & M. c. 20, and of which they were deprived by the repeal of that statute by the 2 & 3 Vict. c. 11: *Fuller* v. *Redman*. (1) The judgment was registered not only three years after the passing of the 23 & 24 Vict. c. 38, but after the death of the intestate, the plaintiff therefore cannot claim priority. *Evans* v. *Williams* (2) may be, perhaps, relied on by the other side, but that was a decision on the 4th section. Kindersley, V.C., there held that where a judgment had been registered before the passing of the 23 & 24 Vict. c. 38, and had not been registered under section 4 of that act, the judgment creditor was not by his omission to re-register his judgment deprived of his right to priority over simple contract creditors; but there the creditor had registered his judgment and had a right which could not be taken away retrospectively. Here the creditor had never registered his judgment in the lifetime of the intestate. *Ex parte Rigby* (3) shews that judgments obtained against personal representatives of a testator need not be regis-

(1) 26 Beav. 600; 29 L. J. (Ch.) 324.
(2) 2 Drew. & Sm. 324; 34 L. J. (Ch.) 661.
(3) 33 L. J. (Ch.) 149.

tered, as the 23 & 24 Vict. c. 38, applies to judgments against testators and intestates only. *Re Turner* (1) is directly in point for the defendants.

*O'Malley, Q.C.*, and *Lumley Smith*, in support of the rule. At the time that the plaintiff signed judgment in 1854, neither the 18 Vict. c. 15, nor the 23 & 24 Vict. c. 38, had been passed, so that the plaintiff's debt was at one time entitled to priority over simple contract debts. In construing the statute the plaintiff cannot be deprived of his vested right without very clear words. Every portion of the act is satisfied whenever a judgment is entered and docketed so as to bind lands. The words are "no judgment which has not already been or which shall not hereafter be entered and docketed." Here, the judgment has been registered after the passing of the act, and therefore the words of the statute have been complied with.

BLACKBURN, J. I think that the point is clear, and that the legislature have correctly expressed their intention. Prior to the 18 Vict. c. 15, owing to the mistakes made in drawing the earlier acts, the law was that a judgment obtained by a creditor, although not registered, bound the land in the hands of a purchaser although he had no notice of the judgment; and a judgment debt had priority over simple contract debts in the administration of assets, so that if an executor, although he had no notice of a judgment debt, paid simple contract debts before the judgment debt he committed a devastavit; and so the law stood until 1855. The error was then partially discovered, and it was thought hard that lands in the hands of purchasers without notice should be bound by a judgment debt. With a view to prevent this the legislature passed the 18 Vict. c. 15, which, in effect, provides that all judgments must be registered in order to affect lands as to purchasers; but that statute left untouched the case of an executor who paid simple contract debts in priority of judgment debts. This being the then state of the law with regard to executors, let us see what the legislature enacts by the 23 & 24 Vict. c. 38. Section 3 recites the 4 & 5 Wm. & M. c. 20, which enacted that no judgment not docketed and entered, as provided by that act,

(1) 33 L. J. (Ch.) 232.

1866

KEMP v. WADDINGHAM.

should affect lands, &c., as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators, in their administration of their ancestor's, testator's, or intestate's estates; it then recites that by several later acts judgments are required to be registered with more particulars than were required by 4 & 5 Wm. & M. c. 20, and that judgments should not affect lands as to purchasers, mortgagees, or creditors, unless they were registered as required by those acts, and that in obedience to a direction in one of those acts (1), the dockets existing under the 4 & 5 Wm. & M. c. 20, were closed, and that the later acts do not expressly enact that judgments not docketed shall not have any preference against heirs, executors, and administrators in their administration of their ancestor's, testator's, and intestate's estates, in consequence of which heirs, executors, and administrators have been held (2) to have lost the protection which they enjoyed under the 4 & 5 Wm. & M. c. 20, and "it is expedient that the same should be restored." What should be restored? Why, the protection which the executor had, under the 4 & 5 Wm. & M. c. 20, if judgment debts were unregistered; if the judgment was not registered, the executor could pay simple contract debts without incurring any liability. The statute then continues: "Be it therefore enacted, that no judgment which has not already been, or which shall not hereafter be, entered and docketed under the several acts now in force, and which passed subsequently to the 4 & 5 Wm. & M. c. 20, so as to bind lands, &c., as against purchasers, mortgagees, or creditors, shall have any preference against heirs, executors, or administrators in their administration of their ancestor's, testator's, or intestate's estates." Now the judgment in the present case would for a short time, between its date and the passing of the 18 Vict. c. 15, have bound lands in the hands of purchasers, but it would not have done so at the time of the passing of 23 & 24 Vict. c. 38, nor at the time of the death of the testator, because it was not registered. The words are, "No judgment which has not already been entered and docketed, or which shall not hereafter be entered or docketed, under the several acts now in force." It is plain that the inten-

(1) 2 & 3 Vict. c. 11.

(2) *Fuller* v. *Redman*, 26 Beav. 600; 29 L. J. (Ch.) 324.

1866

KEMP v. WADDINGHAM.

tion of the legislature was that a judgment, which was not at the time of the passing of the act, or during the lifetime of the debtor, so registered as to affect lands, should not be entitled to priority. This is not the case of depriving a person of a vested right; if the intestate had been dead when the act passed possibly it would have made a difference.

MELLOR and LUSH, JJ., concurred.

*Rule discharged.*

Attorneys for plaintiff: *Ravenscroft & Hills.*
Attorneys for defendants: *Coverdale & Co.*

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THE OVERSEERS OF THE TOWNSHIPS OF HILTON AND WALKERFIELD, APPELLANTS; THE OVERSEERS OF THE TOWNSHIP OF BOWES, AND OTHERS, RESPONDENTS.

Jan. 20.

*Poor Law—Valuation List—Game, Reservation of right to—Inclosure Award, construction of—Conversion of Waste into stinted pasture—Severance of right of shooting from soil*—8 & 9 *Vict. c.* 118, *s.* 116.

A manor, with all the wastes and rights of sporting, &c., was conveyed to trustees in trust for the owners of ancient tenements within the manor. By an award confirmed by an inclosure act, the waste of the manor was converted into a stinted pasture, a certain number of stints was allotted to the trustees as lords in trust of the manor, and a proportionate number to each freeholder, ancient or otherwise. The award contained a clause "that the right and interest in all mines under the lands to be inclosed, also the right to all manner of game upon the said lands, be not in any way affected or interfered with by this inclosure; and that all persons entitled to such mines and game have the same right of entry and other rights as heretofore used and enjoyed:"—

*Held*, that the effect of the award, coupled with the 8 & 9 Vict. c. 118, s. 116, was to pass the soil in the stints to the lords in trust and the freeholders as tenants in common, and to leave the right of shooting in the lords, so that the right was severed from the soil, and become an incorporeal right in gross; and as such, was neither itself assessable to the poor-rate, nor to be taken into account as enhancing the value of the stints. And that the fact that some of the stintholders who were entitled to the benefit of the trust occupied their own lands and stints made no difference; as the benefit from the trust could not be connected with their occupation so as to enhance the rateable value of it.

ON an appeal to the Quarter Sessions for the county of Durham, —in which county the greatest number of the parishes belonging to

1866

OVERSEERS OF THE TOWNSHIPS OF HILTON AND WALKERFIELD *v.* OVERSEERS OF THE TOWNSHIP OF BOWES.

the Teesdale Union is situate, against a valuation list of the rateable hereditaments in the township of Bowes, made in pursuance of the Union Assessment Committee Act, 1862, and approved by the Assessment Committee of the Teesdale Union, in which Union the township of Bowes, and also the townships of Hilton and Walkerfield are situate, and in which appeal the overseers of the poor of Hilton and Walkerfield were appellants, and the overseers of the poor of Bowes, the guardians of the poor of the Teesdale Union, and William Dent, Thomas Emerson Headlam, John Highmoor, and Thomas Witham, were respondents,—a case was by consent, under 12 & 13 Vict. c. 45, stated by an arbitrator for the opinion of this Court.

3. In and previous to the reign of Charles I., the owners of lands and tenements within the manor of Bowes in the North Riding of the county of York were customary tenants of the Crown; the manor of Bowes, with the moors and wastes and royalties thereof, being then the property of the Crown, and portions of the manors or lordships of Middleham and Richmond in the said county or one of them.

4. Charles I. sold the whole to the mayor, commonalty, and citizens of the city of London.

5. In the year 1656, the then customary tenants (through the negotiation of a Mr. Hanby) purchased their several tenements of the Corporation of London, and took a conveyance thereof to trustees, who subsequently conveyed to every customary tenant his land in fee simple upon receiving his share of the purchase money, calculated in the proportion which his customary yearly rent bore to the whole rents of the manor.

6. At the same time the owners of ancient lands and tenements, or some of them, through the same negotiator, purchased the manor and the moors, wastes, and royalties, with some hereditaments which the Crown had held in its own possession, and the same were conveyed to Mr. Hanby by deed, dated August 4th, 1657. The following is a description of the parcels in this deed: "All that the lordship or manor of Bowes, with the rights, members, and appurtenances thereof in the county of York, and all that toll, tollage, or custom within the said manor of Bowes, with all its rights, members, liberties, and appurtenances there-

unto belonging and appertaining in the said county; and all that common furnace, with the appurtenances situate and being in Bowes as aforesaid; and all that close of ground and pasture, together with the cottage thereupon built, and all other the appurtenances thereunto belonging, situate, lying, and being, below the Castle in Bowes aforesaid, which said tollage, custom, common furnace, close of ground and cottage, with the appurtenances and a mill formerly granted unto the said Christopher Hanby, are in the indenture now in recital expressed to be charged, and for ever to continue charged with, and liable to, the payment of the yearly fee farm rent of 20*l.* 0*s.* 4*d.* And, also, all wastes, grounds, commons, heaths, furzes, moors, marshes, ways, void ground, woods, underwoods, streams, banks, rivers, waters, watercourses, fowlings, hawkings, huntings, mines of coal and lead (opened and not opened), quarries, reversions, rents, services, heriots, fines, amerciaments, courts leet, courts baron, and view of Frankpledge, and all other courts, liberties, perquisites, and profits of the said courts, and of all other the premises, goods, and chattels of felons and fugitives, felons of themselves, and of persons outlawed, attainted, condemned, and of persons put in exigent, ways, estrays, deodands, estovers, common of estovers, fairs, markets, and profits of fairs and markets, courts of pie poudre, duties, customs, pickage, emoluments, immunities, freedoms, and hereditaments whatsoever, within the townships, parishes, hamlets, precincts, territories of Bowes, Boldron, Sleightholme, Stoneykeld, and the Spittal, or elsewhere within the said county of York, to the said manor or lordship of Bowes belonging or appertaining, or accepted, reputed, known, placed, letten, or enjoyed, as part, parcel, member, appendant, or appurtenant, of or to the said manor or lordship, or reputed manor or lordship, aforesaid." . . "Excepted and always reserved out of the said grant the fee farm rents therein referred to, and excepted and reserved all and singular the messuages, lands, tenements, cottages, cattlegaits, woods, underwoods and trees, common, common of pasture, moor, and turbary privilege of slate and stone, lights, easements, profits and commodities and other hereditaments, with the appurtenances situate, lying, and being, in the townships, precincts, parishes, hamlets, and territories of Bowes, Boldron, Sleightholme, Stoneykeld, and

1866

OVERSEERS OF THE TOWNSHIPS OF HILTON AND WALKERFIELD v. OVERSEERS OF THE TOWNSHIP OF BOWES.

the Spittal, or any of them, which, before the date of the said recited indenture had been sold or contracted for by any person or persons authorized by, or on behalf of, the mayor, commonalty, and citizens of the City of London, unto or with any person or persons whatsoever."

7. By a deed dated 21st of October, 1658, Mr. Hanby, in consideration of 160*l.*, conveyed the manor, with the wastes, commons, and other hereditaments mentioned in the deed of 1657 (except the tollage, the castle, and some closes of land and rights of pasture connected therewith, and all mines of lead and coal within the wastes and commons of the said manor) to trustees, and by a deed dated 29th of November, 1682, the same were declared to be held "upon trust and confidence that the trustees should and would, from time to time, and at all times from thenceforth for ever, permit and suffer every of the persons mentioned in the schedule thereunto annexed, their heirs and assigns, being tenants of the several messuages, lands, and tenements in the said schedule contained, and then in their several and respective tenures and occupations, to have and convert to their own uses respectively, a rateable share and proportion of the rents, issues, and profits of the said manor and premises, and of every part or parcel thereof so granted as aforesaid, according to the proportion of the several ancient yearly rents of the said messuages, lands, and tenements, and of the moneys by them respectively paid for the purchase of the premises, which said rents and moneys are set down, expressed, and declared in the schedule thereunto annexed." A schedule is added to the trust deed, in which is set forth a list of owners, their ancient rents, and the amounts subscribed by each towards the general purchase.

8. By successive assurances the premises were conveyed to new trustees; in 1841, difficulties having arisen in ascertaining who were the then owners really entitled to the benefit of the trusts and how the revenues should be administered, the then trustees filed a bill in the Court of Chancery to have the *cestui que trusts* ascertained, and the trusts carried into effect under the direction of the Court. In such suit it was established that the persons beneficially interested were, in fact, all the then owners of ancient tenements in the manor; and a schedule was made comprising

their names and the respective yearly values of their tenements, the final decretal order of the Court made on the 7th of November, 1853, being that the revenues of the trust (after satisfying current costs and charges) should be divided by the trustees triennially amongst the parties entitled, and that new trustees should be appointed.

9. By deed dated in 1854, the said manor, moors, wastes, royalties, and hereditaments, were conveyed to new trustees, William Dent, Thomas Emerson Headlam, John Highmoor, Thomas Walton the younger (since deceased), and Thomas Witham, and their heirs, upon the trusts and for the purposes mentioned in the deed of 29th of November, 1682, and the decree of the 7th of November, 1853.

10. The trustees individually are owners of ancient lands in Bowes, and Mr. William Dent is a resident inhabitant of the township.

11. Amongst the hereditaments conveyed to the trustees with the manor and royalties, is a certain moor in the township of Bowes, referred to in the parcels of the deeds of 1657, and October, 1658, and November, 1682, containing at present about 11,000 acres of land, but of somewhat greater extent at the time of those deeds.

12. In 1766, an act of parliament was passed for enclosing Bowes Moor, and also several open fields or pastures in Bowes. Under this act a portion of the moor was divided and inclosed. By the same act the commissioners had power, on request of the majority of commoners, to except out of the inclosure any part of the moor which might be considered not worth the expense of cultivation, and the excepted parts were to remain as if the act had not been made, and the 11,000 acres and upwards of present moor were excepted out of the said inclosure, not being considered then capable of profitable cultivation.

13. Up to, and subsequently to the year 1766, when this division and inclosure of certain portions of the open grounds or wastes took place under the authority of the act of parliament just stated, the right to depasture upon the moor was vested in and exercised by the owners of ancient lands and tenements only, being the same persons as were entitled to the manorial rights under the trust deed of 1682; but between that year (1766) and the year

1866

OVERSEERS OF THE TOWNSHIPS OF HILTON AND WALKERFIELD v. OVERSEERS OF THE TOWNSHIP OF BOWES.

1856, the owners of some of the allotment lands set out under the inclosure act have acquired rights of common upon the moor by user. This has given rise to two classes of owners, namely, owners of old land (which is ancient land), and owners of new land (which is allotment under the inclosure of 1766), and owners of which acquired rights of common by user, as before mentioned. The difference between these classes is, that the old land is entitled to manorial rights and the benefit of the trusts of 1682, whilst the new land is entitled to rights of common only, and not to participation in the manorial rights or profits of the said trust.

14. In the year 1856, a provisional order was made by the Inclosure Commissioners, under the authority of the general Inclosure Acts for converting the moor into a stinted or regulated pasture. This order contained the following reservation: "And that the right and interest in all mines, minerals, stones and other substrata under the lands to be inclosed, and also the right of all manner of game upon the said lands be not in any way affected or interfered with by this inclosure, and that all persons entitled to such mines, minerals, substrata and game, have the same rights of entry, and other rights as heretofore used and enjoyed."

15. This order was afterwards confirmed by parliament by the 20 Vic. c. v. s. 16. Since the passing of this act each freeholder has had allotted to him thereunder a proportionate number of stints or pasture gaits according to the value of his property, and 361 stints were awarded to the trustees as lords in trust of the manor, which stints they hold in trust for the same class of freeholders as are entitled to the manorial rights and profits under the trust deed, and the profits derived from these stints form an item in the trustees' annual account of receipts and expenditure hereinafter referred to. The remaining stints were awarded exclusively to the owners of ancient lands and tenements, except in the case of the owners of allotment lands who had gained rights of common by user as before stated.

17. An annual meeting of the owners of stints or cattlegaits is held the first Monday in February, when five persons are appointed by them field reeves under the General Inclosure Act, and these field reeves have full power and authority to manage and regulate the moor, so far as relates to the herbage, and in order to defray

the expenses they raise money by a rate levied under the powers of the General Inclosure Act. 18. The field reeves, among other duties, have to protect the moor from overstocking by stint owners, and from trespasses by strangers' cattle. 19. Another duty of the field reeves is to look after and take care of the cattle on the moor, and for this purpose they have shepherds, and by arrangements between the trustees and field reeves these shepherds assist the gamekeepers and watchers to preserve the game on the moor, a yearly sum being allowed for that purpose by the trustees towards the expense. 20. The trustees appoint a gamekeeper, who is paid by them exclusively, and whose time is entirely devoted throughout the year to the preservation of the game on the moor. They also employ night and other watchers when necessary.

21. In the grouse season the trustees issue tickets, now charged 20*l.* each, which are personal licences to shoot upon certain conditions, and which enable the holders to sport on these moors for twenty days, from the 12th of August, and then (after an intermission of the month of September) for ten days in October. The trustees also let the stone and flag quarries on the moors, and publish a yearly account of their receipts and expenditure. The trustees divide the balance in their hands triennially amongst the persons entitled, who are the owners of ancient lands and tenements within the manor, the trustees themselves also participating as owners.

22. The revenue derived from the sale of the tickets or licences to shoot on the moors and wastes varies, and during the years 1859 to 1864 (excepting 1862, when no licences were issued) it varied from 504*l.* to 800*l.*

23. The quarries are included in the valuation list, and rated to the relief of the poor, and so are the stints or pasture gaits set out to freeholders, but the 361 stints awarded to the trustees do not appear to be included in the valuation list or to be rated. The respondents, however, admit their rateability, and that of the quarry, herbage, and cottage garden rents, and agree that they may be included in the valuation list, and that such list may be amended accordingly, so that their rateability may not be matter of contention before the Court. The amounts received

1866

OVERSEERS OF THE TOWNSHIPS OF HILTON AND WALKERFIELD v. OVERSEERS OF THE TOWNSHIP OF BOWES.

from the sale of tickets, and shewn in the account annexed, are not rated, nor in any way included in the said valuation list. Many of the owners of ancient lands entitled to participate in the income derived from the said trusts occupy their own lands and stints, others let their lands to tenants, either together with or separately from the stints. But no sum is added either in the rate or valuation list to the rateable hereditaments of any owner or occupier in respect of such portion of the profits of the trust as arises from the licences to sport.

24 & 25. The appellants' notice of appeal contained grounds which raised the specific objection taken by them, that in the valuation list under the Union Assessment Act the trustees are not, nor are any of the freeholders, beneficially interested under the trust deed, whether such freeholders occupy their own ancient lands and stints or otherwise; nor are any other persons, either directly or indirectly, rated or included for or in respect of all or any part of the profits derived from the moor and the trusts aforesaid by the granting of the tickets or licences to sport, or otherwise in respect of the increased annual value of their ancient lands and tenements, by reason of their participation in such last-mentioned profits, and that such trustees, or the persons beneficially interested, or some of them, should be so rated and included, or that such profits or income ought in some manner to be added to or included in the valuation list of the said township of Bowes, as a portion of the rateable income of the moor, or of the ancient lands and hereditaments deriving an enhanced value from their participation therein.

26. It was agreed that the act 20 Vict. c. v, and the Inclosure Act of 1766, and the general inclosure acts, are to be available for all parties so far as they respectively relate to or bear upon the case.

The questions for the opinion of the Court were, whether the objection of the appellants is to any and to what extent sustainable, and whether the profits shewn to be received, and distributable by the trustees under the said trust, and not already included in the said valuation list, or agreed so to be included as before stated, are rateable to the relief of the poor, and if so, whether the rate should be upon the trustees or on all or any of the owners or others in

proportion to their respective interests or to the increased value of their rateable hereditaments in the said township, in consequence of such profits or how otherwise; and the assessment committee of the Teesdale Union were to amend the valuation list of the said township of Bowes, or cause a supplemental or substituted valuation list of the rateable hereditaments in the said township to be made in conformity with the decision of the Court.

*E. James, Q.C.*, for the respondent overseers. (1) This right of shooting, however valuable, is a right in gross, and, therefore, neither is it rateable in itself, nor can it be taken into consideration as enhancing the value of any rateable subject matter. By the General Inclosure Act, 8 & 9 Vict. c. 118, s. 116 (2), the soil in the stinted pasture is vested in the stint-owners as tenants in common, subject to the reservation of the minerals and any other rights reserved by the act or award. In the present case the right of shooting is reserved to, and is now vested in, the trustees, not as owners of the soil, but by virtue of the reservation. And it is an incorporeal hereditament, and forms no part of the profit of the ownership of the soil. It is true that the trustees and some of the owners of stinted pastures who are also beneficially interested in the shooting are themselves occupiers; but the value of the stinted pastures is not increased by this circumstance, the two rights are totally unconnected. (3)

*Manisty* (*G. Bruce* with him) for the appellants. Before the conversion of the waste into stinted pasture the right of shooting was

(1) *Manisty, Q.C.*, for the appellants, claimed the right to begin; but the Court intimated that the invariable practice in the argument of cases stated, on appeal, under the 12 & 13 Vict. c. 45, without going to the sessions, is for the respondents to begin.

(2) 8 & 9 Vict. c. 118, s. 116. "The right of soil of and in all land which shall be converted into regulated pastures, shall, subject to the right of the lord of the manor to all or any of the mines, minerals, stone, and other substrata, where the same shall be reserved to him under this act, and to the other rights given or reserved by this act and the award in the matter of such inclosure, be vested in the persons who, under the direction and determination of such award, shall be the owners of the stints or rights of pasture therein, in proportion to the shares or aliquot parts which such stints shall be thereby declared liable to of any rate under this act, as tenants in common."

(3) *T. Jones*, for the respondent trustees, claimed to be heard; but the Court refused to hear more than one counsel, the case of all the respondents being identical.

1866

OVERSEERS OF THE TOWNSHIPS OF HILTON AND WALKERFIELD v. OVERSEERS OF THE TOWNSHIP OF BOWES.

in the lords of the manor as owners of the soil; by the award, confirmed by the private act, and by force of the 8 & 9 Vict. c. 118, s. 116, the soil in the stints is vested in the trustees, as owners of 361 stints, and the other allottees as tenants in common. But the right of game is to remain unaffected, it therefore still follows the ownership of the soil. If this be not the true construction of the award, the reservation may be taken to apply to seigniorial rights, as intended to protect any right of free warren which might be in the lords of the manor: *Greathead* v. *Morley* (1); that case was followed in *Bruce* v. *Helliwell* (2); and was not overruled by *Ewart* v. *Graham* (3), as is pointed out by Wilde, B., in *Bruce* v. *Helliwell*. (2) But even if the right of shooting is severed from the direct ownership of the soil, it is in the hands of some at least who are either legally or beneficially possessed of the soil, and so the value of the right must be taken into consideration as enhancing the benefit of the occupation. The Union Assessment Committee Act, 25 & 26 Vict., c. 103, ss. 14, 15, affirms the principle of rating at the enhanced value: *Overseers of Sunderland* v. *Sunderland Union*. (4)

COCKBURN, C.J. I am of opinion that this right of shooting is not a right in respect of which the trustees in whom it is vested are rateable. The right of shooting is in general one of the incidents of the ownership of the soil, and this right, previous to the inclosure acts, was vested in the trustees to whom the soil of the waste belonged as lords of the manor. By the proceedings under the Inclosure Act the waste of the manor over which the lords had the right of shooting was vested as stinted pasture in the lords and a certain number of the freeholders. But the right to all manner of game was by express reservation not to be affected. This was a parliamentary or statutory conveyance of the soil of the waste, which formerly belonged to the lords, to the lords, in respect of their 361 stints, and to the other stint-holders in respect of their stints, as tenants in common; but the right of shooting, which would otherwise pass as incident to the owner-

(1) 3 Man. & G. 139.
(2) 5 H. & N. 609; 29 L. J. (Ex.) 297.
(3) 7 H. L. C. 331; 29 L. J. (Ex.) 88.
(4) 18 C. B. (N.S.) 531; 34 L. J. (M.C.) 121.

ship of the soil, does not follow this conveyance; for it appears to me impossible to hold that each of the stint-holders has the right of shooting in common with the lords, because that would have the effect of nullifying the reservation, which says that the right to all manner of game upon the said lands be not in any way affected or interfered with by this inclosure. Mr. Manisty also contended that this clause of reservation might be inserted to protect any seigniorial rights such as those of free-warren. But I do not think that is the true construction of the clause; I think its intention is to reserve or give to the lord the right of sporting severed from the ownership of the soil, and it is a reservation almost invariably to be found in private inclosure acts, when rights of common over the waste are converted into the ownership of a portion of the soil; and this reservation is expressly recognized in the General Inclosure Act. Although it is perfectly true that if the right of shooting had remained in the lords, together with the ownership of the soil, the right as incident to the ownership of the soil would have been taken into consideration as enhancing the value of the occupation of the soil by the lords or their tenants, and so the right of shooting, though indirectly, would practically have been assessed to the poor-rate; yet it is admitted that if the right be simply incorporeal and in gross it is not assessable. It may be expedient that the legislature should have interfered and provided that a right, the severance of which from the soil decreases the rateable value of the soil, should be itself rateable, but it is not for us to legislate. The only question in the present case is, whether the right of shooting has become an incorporeal hereditament unconnected with the ownership of the soil. I think the effect of the order is to leave the right in those persons in whom it was before the order, and being then in the trustees as lords in trust of the manor, it is still in them; just as in the ordinary case of alienation by deed *inter partes* with a clause reserving the right of shooting, the right does not vest in the alienee of the soil, but becomes vested in the alienor as an incorporeal hereditament in gross. This right, therefore, being of that nature, is neither rateable itself nor connected with any rateable subject matter so as to be taken into consideration in the valuation list.

1866

OVERSEERS OF THE TOWNSHIPS OF HILTON AND WALKERFIELD v. OVERSEERS OF THE TOWNSHIP OF BOWES.

BLACKBURN, J. I am of the same opinion. In order to make a person rateable to the poor-rate he must be the occupier of some subject matter which is itself rateable; but the rateable value of the subject matter may be enhanced by something which is incident to the occupation, though not in itself rateable, such as the right of shooting. Here therefore the question is, whether the right, valuable as it is, is so connected with any rateable subject matter that it may be taken into account as enhancing the value of the occupation; and that raises the question, whether the right remains attached to the ownership of the soil, or has been severed from it and become a right in gross. If the facts were that the right were still attached to the land, and the shooting were let to third persons, the effect of that might possibly raise some nice questions as to the rating; but it is unnecessary to speculate upon them, as I agree that the effect of the Inclosure Act and the order for inclosure was to sever the right of shooting from the soil. It is agreed that the trustees had the ownership of the soil of the waste as lords of the manor, and the right of shooting as incident to that ownership; and by the 8 & 9 Vict. c. 118, s. 116, "the right of soil in all land converted into regulated pasture shall be vested in the persons who are made owners of the stints as tenants in common." If there were nothing more, the tenants in common would each also have the right of shooting, however inconvenient that state of things might be. But the section says that this right to the soil is to be subject to the rights given or reserved by the act or by the inclosure award, and we have therefore to look to the order to see what rights are given or reserved by it. The clause in question is, "That the right and interest in all mines, minerals, and other substrata under the lands to be inclosed, and also the right of all manner of game upon the said lands, be not in any way affected or interfered with by this inclosure." Which certainly seems to mean, not that the rights of shooting, &c., should follow the ownership of the surface of the soil, but that they shall remain vested as before. And this is further shewn by the last lines: "And all persons entitled to such minerals and game have the same rights of entry and other rights as heretofore used and enjoyed." This clearly contemplates rights already existing in third persons, and that some persons other than the allottees of

stints are to continue to have the right to the substrata and game with rights of entry as before.

Mr. Manisty cited two or three cases, the decisions in which proceeded upon the construction of reservations in private inclosure acts. They all proceeded on the same principle, that that right which formerly existed as part of the ownership of the soil shall be enjoyed separate from the soil, but that the reservations could only refer to existing rights, whether territorial or seigniorial, so as to be construed as preserving existing rights, but not as creating new. In the present case the words used in the reservation must be taken to have been used in a popular sense, that the persons now possessing the rights shall remain in possession, though by a different title; and the result is that the trustees have a right in gross in trust for those who are beneficially interested. The fact that some of these stint-holders are in occupation of their stints cannot affect the question; for though a stint-holder derives benefit from the right of shooting held in trust for him, in no possible way can it be said that the value of the occupation is enhanced by that circumstance. The hypothetical tenant would take no interest in the trust under a demise of the pasture, and would therefore give nothing more for the occupation.

LUSH, J. I am of the same opinion. A right of shooting is not in itself rateable; but its value is brought into account when it is incident or appurtenant to land, because it improves or makes more valuable the land out of which or in respect of which the right exists. The question therefore is, whether this right of shooting is incident to the ownership of the soil. Before the inclosure, the right of shooting was in the lords of the manor as incident to the ownership of the soil; but if the award ratified by the act severed the one from the other, its effect was to create an incorporeal hereditament. What, then, is the meaning of the clause of reservation? As to that I cannot entertain any doubt. The award intended to vest the surface of the soil, over which many persons had rights in common, in those persons, but to preserve the minerals and the right of shooting to those who had them before. I cannot doubt that was the intention of the order, and I have still less doubt that the words used, if not technically correct, are amply sufficient to effect that intention. The consequence is

1866

OVERSEERS OF THE TOWNSHIPS OF HILTON AND WALKERFIELD *v.* OVERSEERS OF THE TOWNSHIP OF BOWES.

that the right of shooting is now an incorporeal hereditament, severed from the ownership of the soil, and as such not assessable to the poor rate, and unavailable to increase the value of the rateable hereditaments in the township.

*Judgment for the respondents.*

Attorneys for appellants: *Ridsdale & Craddock.*
Attorney for respondent overseers: *T. H. Dixon.*
Attorney for respondent trustees: *Tyas.*

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*Feb.* 1.

JEFFS *v.* DAY.

*Pleading—Equitable plea—Chose in action—Assignment of debt.*

To an action for money due on an award the defendant pleaded, on equitable grounds, that the plaintiff assigned the debt to D. & Co., who gave notice to the defendant, and that the assignment still remained in force, and that the defendant still remained liable to pay D. & Co.; that the action was not brought for the benefit of D. & Co. nor with their consent; and if the plaintiff recovered in the action the defendant would nevertheless be obliged to pay D. & Co.:—

*Held*, that the plea was good, as a court of equity would grant an unconditional injunction to restrain the plaintiff from suing for his own benefit.

ACTION for money payable by defendant to plaintiff under an award.

Plea as to 55*l.* 7*s.* 9*d.* parcel, &c., on equitable grounds, that the plaintiff, for a good and valuable consideration, assigned to, certain persons trading under the firm of Devas, Routledge, & Co. the sum of 55*l.* 7*s.* 9*d.*, and they then gave express notice to the defendant of the assignment, and required the defendant to pay the sum of 55*l.* 7*s.* 9*d.*, and the assignment still remains in full force and unrevoked, and the defendant still remains liable to pay the same to the said persons, and this action is not brought in any manner or to any extent for the use or benefit of Devas, Routledge, & Co., or with their knowledge, privity, or consent; but, notwithstanding, they still require the defendant to pay the sum of 55*l.* 7*s.* 9*d.*, and in case the plaintiff recovers the same in this action, the defendant will be forced and obliged to pay the same, notwithstanding such recovery, to the said persons, and the

plaintiff sues for the sum of 55*l.* 7*s.* 9*d.* inequitably and in fraud of the assignment and notice.

Demurrer and joinder.

1866

JEFFS v. DAY.

*Thesiger*, in support of the demurrer. The plea affords no defence on equitable grounds. It shews that there is an equitable assignment by the plaintiff of the debt due from the defendant to Devas, with express notice to the defendant, but it does not shew that the original debt has been extinguished, or any promise by the defendant to pay Devas. There may be a state of circumstances in which it would be inequitable to plead this plea. Suppose that the defendant became bankrupt, the plaintiff might be called upon to pay the whole of his debt to Devas, while he could only come in as a creditor under the defendant's bankruptcy and receive a dividend. A court of equity would not grant an absolute and unconditional injunction to restrain proceedings at law, because the debt might revest in the plaintiff, and, if so, he would be entitled to sue for his own benefit; it would, therefore, only restrain him from suing the defendant so long as the assignment remained in force. *Wharton* v. *Walker* (1), *Liversidge* v. *Broadbent* (2), *Cochrane* v. *Green* (3), shew that since the debt is not extinguished, and there is no promise to pay Devas & Co., they could not maintain an action against the defendant.

*Joseph Brown, Q.C.*, contrà. It is admitted that a plea, which discloses matters that would induce a court of equity to grant only a conditional or temporary injunction, is bad: *Wodehouse* v. *Farebrother* (4); but in the present case the averments in the plea, if true, would entitle the defendant in equity to a perpetual, absolute, unconditional injunction. [He was then stopped by the Court.]

BLACKBURN, J. In this case the plea in effect states, that the plaintiff is suing for a debt which he for a good consideration has assigned to third persons, and that they have given notice of the assignment to the defendant, and that it is still in force. All the

(1) 4 B. & C. 163.
(2) 4 H. & N. 603; 28 L. J. (Ex.) 332.
(3) 9 C. B. (N.S.) 448; 30 L. J. (C.P.) 97.
(4) 5 E. & B. 277; 25 L. J. (Q.B.) 18.

1866

JEFFS v. DAY.

cases, from *Winch* v. *Keeley* (1), shew that an assignment of a chose in action after notice to the debtor is perfectly valid in equity, and passes the beneficial interest. The plaintiff has assigned his debt, and is therefore improperly and in breach of good faith suing for it. Mr. Thesiger contends that a plea cannot be pleaded as an equitable defence, except in those cases in which a court of equity would grant an absolute and perpetual injunction. The reason for that is well explained in *Wodehouse* v. *Farebrother*. (2) Under the Common Law Procedure Act, 1854, we have jurisdiction to entertain equitable defences, but we can only allow such pleas to be pleaded, as if proved, would be a simple bar to the action, and would entitle the defendant to the common law judgment "that the plaintiff take nothing by his writ, and that the defendant go thereof without day," which would in effect be equivalent to a perpetual injunction in a court of equity. There appears to me to be no difficulty in the present case. The debt has been assigned, and has become the property of Devas and Co., and the plaintiff would be restrained in equity from suing the defendant for his own benefit. Devas and Co. may bring an action for the debt in the plaintiff's name, on indemnifying him for costs; but if the plaintiff prosecutes an action for the benefit of any person other than the assignees, a court of equity would stop him. It is true, that at some future time the debt may possibly revest in the plaintiff, in which case he would have a right to sue; but then there would be a new state of circumstances, to which the injunction would not apply. Neither could this judgment at common law, under such circumstances, be successfully pleaded as res judicata.

8 Ex 194

MELLOR, J. If Mr. Thesiger was right in his contention, that a court of equity would not grant a perpetual injunction, the plea would be bad. The facts stated in the plea are, that the plaintiff has assigned a debt due to him from the defendant to third persons, and the assignees have given the defendant notice of the assignment; it would be very inequitable if the plaintiff, after having effectually in equity parted with his property, could be permitted to sue for it, but there would have been no defence to such an action, had not the Common Law Procedure Act been

(1) 1 T. R. 619. (2) 5 E. & B. 277; 25 L. J. (Q. B.) 18.

passed, which enables us to entertain pleas pleaded by way of defence on equitable grounds. If the facts stated by way of equitable defence are proved, I cannot doubt but that a court of equity would grant a perpetual injunction. But if other circumstances arose, and the plaintiff acquired a new title, then the present judgment would be no bar to a fresh action.

1866

JEFFS v. DAY.

SHEE, J., concurred.

*Judgment for the defendant.* (1)

Attorney for plaintiff: *H. Woodward.*
Attorney for defendant: *G. Cheatle.*

(1) See *Jones* v. *Farrell*, 1 De G. & J., at pp. 218, 219.

END OF HILARY TERM.

# CASES

DETERMINED BY THE

# COURT OF QUEEN'S BENCH

AND BY THE

# COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

## EASTER TERM, XXIX VICTORIA.

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1866
*April* 16.

HOLMES AND OTHERS *v.* JAQUES.

*Promissory Note—Certainty of Payee.*

"On demand I promise to pay to the trustees of the W. Chapel or their treasurer for the time being 100*l*." is a good promissory note, for there is no uncertainty in the payee, as the trustees alone are to be taken as payees, and their treasurer as their agent only to receive payment.

DECLARATION by the plaintiffs as payees of a promissory note against the defendant as maker. Plea, traverse of the making.

At the trial, before Shee, J., at the last spring assizes at Leeds, it appeared that the defendant, in 1861, signed the following instrument:

"Harrogate March 18, 1861.

"On demand I promise to pay to the trustees of the Wesleyan Chapel Harrogate or their treasurer for the time being the sum of 100*l*., in four equal instalments of 25*l*. each, each of such instalments to be due and payable on the 1st Oct. annually, for value received."

The plaintiffs and four other persons were the original trustees

of the chapel, the plaintiffs being the survivors. A verdict was returned for the plaintiffs for the amount claimed, with leave to move to enter a verdict for the defendant, if the Court should be of opinion that the instrument was invalid as a promissory note.

*Manisty, Q.C.*, moved accordingly. The instrument sued upon is not a valid promissory note, owing to the uncertainty of the payees. It is payable to the trustees or their treasurer for the time being; if this be taken to mean the trustees for the time being, or their treasurer for the time being, then it is uncertain as to both, and is bad as a promissory note: *Cowie* v. *Stirling* (1); *Yates* v. *Nash.* (2) But the principal objection to the instrument is that it is payable to the trustees or the treasurer in the alternative, and *Blanckenhagen* v. *Blundell* (3) is a direct authority that this uncertainty renders the instrument no promissory note.

[BLACKBURN, J. For all that appeared in that case the persons named in the alternative as payees were strangers in interest, and Bayley, J., suggests that, had there appeared a community of interest, then (as appears here) an action might possibly have been maintained.

LUSH, J. You admit that a note payable to "trustees" is sufficient without naming them?]

Yes. That cannot be maintained as an objection. (4)

COCKBURN, C.J. I am of opinion that there should be no rule. I fully concur in what Mr. Manisty has said, that the payee must be a person certain; and a promise to pay A. or B., apparent strangers, in the alternative, would not be a good promissory note; but all this instrument shews is that it is payable in the first instance to the trustees as payees, but with the option of the maker to pay to the treasurer for the time being, as their agent.

The treasurer would have no authority to sue in his own name, but only to receive the money on behalf of the trustees.

(1) 6 E. & B. 333; 25 L. J. (Q. B.) 335.

(2) 8 C. B. (N. S.) 581; 29 L. J. (C. P.) 306.

(3) 2 B. & A. 417.

(4) See *Megginson* v. *Harper*, 2 C & M. 322; 4 Tyr. 94; and the judgment in *Storm v. Stirling*, 3 E. & B. at p. 842; 23 L. J. (Q. B.) at p. 301.

1866

HOLMES v. JAQUES.

I think it would be to introduce unnecessary strictness if we were to say that this was not a valid promissory note: and by holding that the treasurer for the time being is simply inserted as an indication that he, as the agent of the trustees, is authorized to receive payment on their behalf, no uncertainty is introduced into the instrument.

BLACKBURN, J. I am quite of the same opinion. I think the true construction of this instrument is that it merely means: I promise to pay to the trustees, or their agent for the time being (the latter being what is implied by law), and I give notice that the treasurer is such agent. This is carrying out the intimation of Bayley, J., in *Blanckenhagen* v. *Blundell* (1), that if there had been any community of interest stated between the payees so as in any respect to identify the one with the other, it is possible than an action might have been maintained on the note. I quite agree with Mr Manisty's argument thus far,—if I thought the treasurer was named as payee so as to be able to indorse the note had it been payable to order, or to sue upon it, there would have been an uncertainty which would have vitiated it as a promissory note; but this is not the construction which ought to be put on the instrument.

SHEE, J. I agree that the treasurer must be taken to be named as agent.

LUSH, J. In two of the cases cited no person was named except the officer for the time being, consequently, of necessity, the officer for the time must have been taken to be meant as the payee; and, therefore, as there was no certain person named as payee, the instrument was invalid as a promissory note or bill of exchange. Here the trustees are designated as payees, and the promise is to pay them by their agent for the time being.

*Rule refused.*

Attorney: *Fiddey.*

(1) 2 B. & A. at pp. 419-20.

## STRAUSS *v.* FRANCIS.

1866
*April* 23.

*Counsel, authority of—Withdrawal of Juror.*

It is within the general authority of counsel retained to conduct a cause to consent to the withdrawal of a juror, and the compromise being within the counsel's apparent authority is binding on the client notwithstanding he may have dissented, unless this dissent was brought to the knowledge of the opposite party at the time.

3 C.L.D. 180
181, 3
13 C.L.D. 861

DECLARATION against the defendant as publisher of the *Athenæum* for an alleged libel contained in a criticism on a novel of the plaintiff, which was as follows:—"*The Old Ledger*, by G. L. M. Strauss, 3 vols. (Tinsley Brothers). Our first impression on opening this production was that so many italics and inverted commas were never congregated into the same space before; our last on closing it is that it must be the very worst attempt at a novel that has ever been perpetrated. It cannot even claim the utility of an opiate: its inanity, self-complacency, vulgarity, its profanity, its indelicacy (to use no stronger word), its display of bad Latin, bad French, bad German, and bad English, its perpetual recurrence of abuse, or, as the author more euphemistically expresses it, 'slightly digressive reflections' on great men, living and dead, and wholly unconnected with the subject,—all make the reader more indignant than weary, and how much this means can only be conceived by an operation which few are likely to attempt, and fewer still to achieve, that of reading the book."

Plea, not guilty.

At the trial before Erle, C.J., at the Surrey Spring Assizes, Ballantine, Serjt., for the plaintiff, simply put in the article in question, and proved that it had reference to the plaintiff's novel.

Hawkins, Q.C., for the defendant, read various paragraphs from the novel, which he contended fully justified the criticism. While he was addressing the jury Ballantine, Serjt., interposed, and a juror was withdrawn by consent, of which course the Chief Justice expressed his approval.

*Kenealy* moved to set aside the compromise and for a new trial, on the ground that the withdrawal of a juror was against the express wish of the plaintiff and without his assent.

The affidavits on which he moved were those of the clerk to Mr.

1866

STRAUSS v. FRANCIS.

L. Levy, the plaintiff's attorney at the trial, and of the plaintiff himself. (1)

He contended that counsel had only authority to conduct a cause in the manner the client instructed him, and had no general authority so as to be able to bind the client by the withdrawal of a juror without his express assent. He cited the case of *Swinfen* v. *Swinfen* (2), in its several stages.

[SHEE, J., referred to *Swinfen* v. *Lord Chelmsford* (3), and *Prestwich* v. *Poley* (4), as directly in point against the plaintiff.]

(1) The clerk to plaintiff's attorney stated, that he had the entire management and conduct of the cause and attended the trial; that he did not sanction the withdrawal of a juror, but requested Ballantine, Serjt., to let it go to the jury, and informed him that the plaintiff would not consent to the withdrawal of a juror; that Ballantine, Serjt., acted on his own judgment in consenting to such withdrawal.

The material parts of the plaintiff's affidavit were as follows:—"I was in court, ready and prepared to be examined in the case; and I had in court also several witnesses of high literary standing and competent scholarship, all of them ready and prepared to give evidence that the charges and imputations made against the novel in the review are unfounded.

"My leading counsel, in omitting to put in the novel as evidence, and to call me and my witnesses, acted entirely on his own personal discretion as counsel. I had no voice in the matter.

"In the midst of Mr. Hawkins's address to the jury (which was based throughout on misrepresentation of the plot, the nature, tone, and tendency of the book, the extracts read being garbled) I was beckoned out of court by my attorney's clerk, who informed me that my leading counsel intended to throw up the case, and to propose that a juror should be withdrawn. I at once energetically protested against this intended proceeding of my counsel, and I insisted that the book so unfairly assailed should be put in as evidence. I told my attorney's clerk that no consideration would induce me to withdraw the case from the cognizance of the jury, or to consent to such withdrawal.

"When I returned into court, I was only just in time to hear Mr. Hawkins's concluding remark in reply to my counsel's proposition to withdraw a juror (as I afterwards found from the report of the case in the public journals), and the Lord Chief Justice's final observations.

"I was not consulted by Mr. Serjeant Ballantine, who acted throughout entirely upon his own personal responsibility. I never authorized him to propose that a juror should be withdrawn. My instructions to him were to let the case go to the jury, no matter what the issue might be. I was not consulted in the matter, and I never gave my counsel, or attorney, or any other person, any authority whatever to propose or consent to the withdrawing a juror, and no consideration would have induced me to consent to such proposal."

(2) 26 L. J. (C.P.) 97; 1 C. B. (N.S.) 364; 27 L. J. (Ch.) 35; 24 Beav. 549; 27 L. J. (Ch.) 491; 2 De G. & J. 381.

(3) 29 L. J. (Ex.) 382; 5 H. & N. 890.

(4) 34 L. J. (C.P.) 189; 18 C. B. (N.S.) 806.

1866

STRAUSS v. FRANCIS.

BLACKBURN, J. We are all agreed that there clearly ought to be no rule. The plaintiff by no means makes out that there was any express dissent on his part to withdrawing a juror; there is nothing on the affidavits to shew that the client absolutely withdrew all authority, nor is there anything to shew that counsel had done so unprofessional a thing as to undertake the conduct of a cause giving up all discretion as to how he should conduct it; still less is there anything to shew that there was the slightest knowledge on the part of the other side that the apparent general authority of counsel had been in fact limited. Mr. Kenealy has ventured to suggest that the retainer of counsel in a cause simply implies the exercise of his power of argument and eloquence. But counsel have far higher attributes, namely, the exercise of judgment and discretion on emergencies arising in the conduct of a cause, and a client is guided in his selection of counsel by his reputation for honour, skill, and discretion. Few counsel, I hope, would accept a brief on the unworthy terms that he is simply to be the mouthpiece of his client. Counsel, therefore, being ordinarily retained to conduct a cause without any limitation, the apparent authority with which he is clothed when he appears to conduct the cause is to do everything which, in the exercise of his discretion, he may think best for the interests of his client in the conduct of the cause: and if within the limits of this apparent authority he enters into an agreement with the opposite counsel as to the cause, on every principle this agreement should be held binding. The case of *Swinfen* v. *Swinfen* was peculiar. In that case counsel of great eminence thought they were doing their best for their client by entering into a compromise, and when the case was first before the Court of Common Pleas (1) all the Court, Cresswell, Williams, and Willes, JJ., concurred that counsel had the apparent authority to make the compromise, and that the client was bound by the act of the counsel, and that the Court could not go into the question of the extent of the actual authority of counsel; but on the second occasion, when the attachment was again moved for (2), there being one member of the Court dissentient, the Court refused, according to the general practice, to let the attachment go;

(1) 25 L. J. (C.P.) 303; 18 C. B. 485.
(2) 26 L. J. (C.P.) 97; 1 C. B. (N.S.) 364.

1866

STRAUSS v. FRANCIS.

but even Crowder, J., who was the dissentient judge, seems to put the ground of his dissent entirely on the fact that the compromise extended to collateral matters, and not merely to the cause itself. And he says, counsel "professes, in conducting a cause, to act entirely on his own judgment and discretion, uncontrolled by his client, and the client leaves the whole management of the cause to the counsel . . . . but it would seem a strong thing to hold that counsel receiving a brief from a plaintiff in a feigned issue out of chancery to try whether there was a valid devise of a large estate to her, had incidentally an implied authority to decide that his client shall agree to waive the question and give up all claim to the estate on her receiving an annuity for life." (1) Again, when the case was before the Courts of Chancery (2), the Courts, in refusing to give effect to the compromise, proceeded on the ground that the issue having been directed to inform the conscience of the Court, it was beyond the competency of counsel to consent to any compromise. In *Swinfen* v. *Lord Chelmsford* (3), the Chief Baron makes a distinction between the authority which a counsel has as to all matters connected with the conduct of a cause, in which he expressly includes withdrawing a juror, and his authority in matters collateral to the suit. In *Prestwich* v. *Poley* (4) the question was as to the authority of an attorney to settle an action, and the compromise was held binding, there being no express prohibition communicated to the other side; and Erle, C.J., and the other members of the Court, treat *Swinfen* v. *Swinfen* as an anomalous case.

I am therefore clearly of opinion that the withdrawal of a juror in the present case is binding. In so deciding, I do not mean to say that counsel can compel a client to enter into a compromise by consenting to the withdrawal of a juror against his will. If the counsel cannot induce his client to act on his advice in such a case, the proper course is to return his brief. Nor do we decide that, if the client's dissent were known to the other

(1) See 26 L. J. (C.P.) at pp. 104—105; 1 C. B. (N.S.) at pp. 400, 401, 402.

(2) See 27 L. J. (Ch.) 35; 491; 24 Beav. 549; 2 De G. & J. 381.

(3) 5 H. & N. at p. 922; 29 L. J. (Ex.) at p. 397.

(4) 34 L. J. (C.P.) 189; 18 C. B. (N.S.) 806.

side, such a compromise would be binding. All we decide is, that when a counsel, acting within his apparent authority, consents to withdraw a juror, the other side, acting fairly, may safely rely on the compromise being binding; and that, in order to invalidate the arrangement, not only must it be shewn that the counsel's authority was limited, but that the limitation was known to the other side at the time.

MELLOR, J. I am of the same opinion, that the matter of arrangement by the withdrawal of a juror was within the apparent authority of the counsel on each side; and that unless it could be shewn that the attempt on the part of the client to limit this authority had been brought to the knowledge of the other side, it was perfectly within the competency of the defendant's counsel to make a valid and binding agreement, assuming, as he had a right to do, that the plaintiff's counsel was acting within his apparent authority. No counsel, certainly no counsel who values his character, would condescend to accept a brief in a cause on the terms which the plaintiff's counsel seems to suggest, viz., without being allowed any discretion as to the mode of conducting the cause. And if a client were to attempt thus to fetter counsel, the only course is to return the brief. I am quite sure no such limitation of authority was consented to by the counsel on the present occasion; and I think the power to withdraw a juror is strictly within the limits of the conduct of the cause; nothing can be more to the advantage of a client than that the counsel should have the power to enter into a compromise of this kind when he finds his own case become desperate, or an overwhelming case made by the adversary. The authority to withdraw a juror is expressly included within the ordinary authority conferred on counsel by the judgment of the Court of Exchequer in *Swinfen* v. *Lord Chelmsford* (1); and Crowder, J., in *Swinfen* v. *Swinfen* (2), only dissented on the ground that the compromise was against the assent of the client, and was in a matter collateral to the action. That at once distinguishes that case from the present.

SHEE, J. I am of the same opinion. We have been in some danger of confounding what is the effect of an arrangement

(1) 29 L. J. (Ex.) at p. 397; 5 H. & N. at p. 922.
(2) 26 L. J. (C.P.) 97; 1 C. B. (N.S.) 364.

1866

STRAUSS v. FRANCIS.

entered into by counsel, and what is the proper course for a counsel to pursue when a client wishes to limit the general authority given to him by retaining him to conduct a cause. The question in the present case is whether the plaintiff is bound by what his counsel did; and as to this it appears to me that we are concluded by authority, and cannot say otherwise than that the client, having retained a counsel to conduct his cause, is bound by that counsel's agreement to withdraw a juror, however much he may disapprove of that course. Withdrawing a juror is clearly within the authority given to a counsel to conduct a cause; and it is obviously for the interest of the client that it should be so; otherwise no compromise could ever be come to during the progress of a cause unless the client himself were there to assent. In *Swinfen* v. *Lord Chelmsford* (1), the question was whether an action would lie against the defendant for having, as counsel, consented to a compromise, and the decision was that no action would lie; but the Lord Chief Baron's judgment went much further, for after stating that counsel has no authority over matters collateral to the suit, he adds, "although he has complete authority over the suit, the mode of conducting it, and all that is incident to it, such as withdrawing the record, *withdrawing a juror*, calling no witnesses, and other matters which properly belong to the suit and the management and conduct of the trial." The Court of Exchequer, therefore, expressly includes the withdrawing a juror within the apparent authority given to a counsel to conduct a cause; so that the opposite party, having agreed to the withdrawal, can insist upon the arrangement being carried out.

On the other question, whether a counsel may be justified in compromising an action contrary to the express wish of his client, particularly in a case which involves personal honour or even literary character, I think in such a case, if the client wishes to fetter the counsel's discretion, and insists on a course of which the counsel cannot approve, the counsel ought to return his brief. And I fully concur in what I understand my learned brothers to hold, that although a counsel has this general authority, it is yet not an authority which cannot be limited.

*Rule refused.*

(1) 29 L. J. (Ex.) at p. 397; 5 H. & N. at p. 922.

1866
*April* 26.

## THE QUEEN *v.* THE JUSTICES OF KENT.

*Lunatic Pauper—Order of Settlement—Union within several jurisdictions—Appeal to what Sessions—*16 & 17 *Vict. c.* 97, *s.* 108.

By section 108 of 16 & 17 Vict. c. 97, any union or parish may appeal against any order, adjudging the settlement of any lunatic confined in an asylum, to the quarter sessions for the county in which the union or parish obtaining the order is situate, or if the parish or union extend into several jurisdictions then to the quarter sessions of the county or borough in which the asylum is situate. An order, under section 97, adjudging the settlement of a pauper lunatic confined in an asylum, was obtained by a union, consisting of parishes partly in a borough, which was wholly in one county but had separate quarter sessions, and partly of parishes in the county at large :—

*Held*, that the appeal against the order, under section 108, was to the quarter sessions of the county, and not to those of the borough in which the asylum was situate.

THIS was a rule calling upon the justices of the county of Kent to shew cause why they should not enter continuances, and hear and determine a certain appeal.

An appeal was entered at the January quarter sessions for Kent, in which the overseers of the parish of Aldershot were the appellants, and the guardians of the Medway Union the respondents, against an order of two justices of Kent, obtained by the respondents, adjudging the place of settlement of a pauper lunatic confined in the Barming Heath asylum to be in the parish of Aldershot, and ordering the overseers of that parish to pay to the guardians of the Medway Union certain sums of money for expenses incurred by them in respect of the lunatic.

The Medway Union consists of several parishes; some of them are situate wholly in the city of Rochester, which is in the county of Kent, but has separate quarter sessions; some partly in the city of Rochester and partly in the county of Kent; and others wholly in the county of Kent. The asylum is situate in the borough of Maidstone, which has separate quarter sessions.

It was objected on behalf of the respondents at the hearing of the appeal, that as the Medway Union extended into two jurisdictions—that is, into the county of Kent and the borough of Rochester—and the lunatic was confined in an asylum situate in

1866

THE QUEEN v. THE JUSTICES OF KENT.

the borough of Maidstone, the appeal ought to have been made to the sessions for the borough of Maidstone.

The quarter sessions, on this ground, decided that they had no jurisdiction to hear the appeal.

*Poland* shewed cause. The appeal was made to the wrong sessions. The question turns on the construction of section 108 of the 16 & 17 Vict. c. 97, which enacts that "if the guardians of any union or parish feel aggrieved by any order adjudging the settlement of any lunatic, they may appeal against the same to the next general quarter sessions for the county in behalf of which the order has been obtained, or in which the union or parish obtaining such order is situate; or, in case such union or parish extend into several jurisdictions, then to the next quarter sessions for the county or borough in which the asylum is situate." Here the union extends into two jurisdictions, the county of Kent and the city of Rochester, the court of appeal must therefore be determined by the situation of the asylum, which is in the borough of Maidstone.

[BLACKBURN, J. Is not the whole union in the county of Kent? The words "in case such union extends into several jurisdictions" mean into several counties; in that case, in order that there may be no dispute to which sessions the appeal should be, it is to be to the sessions of the county or borough in which the asylum is situate.]

If a borough, though in a county, has a separate jurisdiction, and the union extends into the county and borough, there is the same difficulty of several jurisdictions as would arise if it extended into two counties.

[BLACKBURN, J. *Reg.* v. *Justices of Warwickshire* (1) is an authority against the respondents. There is, however, a dictum of Crompton, J., in that case in their favour.]

Yes. This is exactly the case put by Crompton, J.; the union is not wholly in one jurisdiction, but is partly in the borough and partly in the county. But *Reg.* v. *Justices of Warwickshire* (1) is not decisive of the present case; there the parish obtaining the order was situate in two co-ordinate jurisdictions.

(1) 28 L. J. (M.C.) 249.

*Barrow*, in support of the rule, was not called upon.

BLACKBURN, J. I think the quarter sessions have not decided according to the true meaning of section 108, which enacts that "if the guardians of any union or parish, or the overseers of any parish, feel aggrieved by any order adjudging the settlement of any lunatic, they may appeal against it to the next general quarter sessions for the county in behalf of which such order has been obtained, or in which the union or parish obtaining such order is situate." On this part of the section the case of *Reg.* v. *Justices of Warwickshire* (1) decides that where the parish obtaining the order is situate wholly in a borough which is within one county, though the parish is in the borough, the jurisdiction to hear the appeal is in the county sessions. Then the section proceeds, "or in case such parish or union extend into several jurisdictions, then to the sessions for the county or borough in which the asylum is situate." If the union extended into two several jurisdictions, then the persons appealing might not know to what sessions to appeal; the appeal, therefore, in that case is to depend on the place in which the asylum is situate; but the word "jurisdiction" in this part of the section must be taken with the previous part; and it clearly means "county." In *Reg.* v. *Justices of Warwickshire* (1) there is a dictum of Crompton, J., that if a parish is partly in a borough and partly in a county, which is the case before us, then the appeal must be governed by the situation of the asylum. I think that dictum erroneous. In the present case, though the union extends partly into the county of Kent, and partly into the borough of Rochester, it is in one jurisdiction, viz., the county, and the appeal is to the county sessions.

LUSH, J. I am of the same opinion. After the decision in *Reg.* v. *Justices of Warwickshire* (1), the phrase "several jurisdictions," in section 108, must be read as "several *such* jurisdictions," meaning counties.

*Rule absolute.*

Attorneys for appellant: *Wilkins & Blyth.*

Attorneys for respondents: *Prall & Nickinson.*

(1) 28 L. J. (M.C.) 249.

1866
*May 7.*

THE QUEEN *v.* LAMBARDE AND OTHERS, JUSTICES OF KENT.

*Friendly Society*—21 & 22 *Vict. c.* 101, *s.* 5—*Duty of Justices to state a case under* 20 & 21 *Vict. c.* 43.

The decision of justices under section 5 of 21 & 22 Vict. c. 101, of a dispute which had been referred to them, pursuant to one of the rules of a benefit society, is a determination of a complaint which the justices have power to determine in a summary manner within the meaning of section 2 of 20 & 21 Vict. c. 43, and the justices ought, on application by the unsuccessful party, to state a case in the manner pointed out by the latter statute.

Overruled Callaghan v Dobson 4 C B 208

THIS was a rule calling on William Lambarde and others, Justices of the county of Kent, to shew cause why they should not state a case under 20 & 21 Vict. c. 43.

By one of the rules of the Sundridge Benefit Society, which had been duly certified by the Registrar, it was provided that, in case of a dispute between the society and any member or person claiming on account of a member, or under the rules, reference should be made to justices, pursuant to 21 & 22 Vict. c. 101, s. 5.

The 5th section of 21 & 22 Vict. c. 101 enacts, that where the rules of any friendly society "shall direct disputes to be referred to justices, then any justice acting in the county or borough in which the place of business of such society shall be situated, upon complaint made by any member, his executors, administrators, nominee, or assigns, or by any person claiming under the rules of the society of any matter in dispute between him or them and the society, to summon the person against whom such complaint is made to appear at a time and place to be named in such summons, and any two justices present at the time and place mentioned in such summons, shall proceed to hear and determine the said complaint, which complaint shall be heard and determined in England in manner directed by the Act ~~20 & 21~~ Vict. c. 43," &c.; "and such justices may make such order thereupon, either for the payment of money or otherwise, together with costs not exceeding 10*s.*, as they shall think fit, and where the order made shall be for the doing of some act other than the payment of money, the said justices may order the payment of a sum of money in default of the doing of such act," &c.

11 & 12

In January, 1865, the society expelled William Wadmore, one

1866

THE QUEEN v. LAMBARDE.

of its members, who thereupon, in pursuance of the before-mentioned rule, obtained a summons against Joseph Watts, the then secretary of the society, to appear before the justices of the county of Kent, sitting in petty sessions at Sevenoaks, to answer a complaint, alleging that the expulsion was illegal as being contrary to the rules of the society.

In February, 1865, the summons was heard, and the justices made an order that the society should reinstate Wadmore as a member, or pay him 25*l.*

Upon this decision Watts applied to the justices to state a case, under section 2 of 20 & 21 Vict. c. 43, which provides that "after the hearing and determination by a justice or justices of any information or complaint which he or they have power to determine in a summary way by any law now in force, or hereafter to be made, either party to the proceeding before the said justice or justices may, if dissatisfied with the said determination, as being erroneous in point of law apply" to the justices to state and sign a case for the opinion of one of the superior courts.

After considerable delay, the justices, in February, 1866, refused to state a case.

*F. M. White* shewed cause. (1) This is not a proceeding in which a case can be stated under 20 & 21 Vict. c. 43. It is really only a question of arbitration. The justices decided as arbitrators acting under the rules of the society, and not as justices of the peace. The rules of the society give the jurisdiction to the justices, and the 5th section of 21 & 22 Vict. c. 101, only points out the manner in which that jurisdiction is to be exercised. The mere fact that a proceeding is by information and complaint does not subject it to the provisions of 20 & 21 Vict. c. 43; *Wheeler* v. *The Overseers of Burmington* (2), and *Walker* v. *The Great Western Railway Company.* (3) He also cited *Townsend* v. *Reed.* (4)

*Harington,* in support of the rule, was not called upon.

(1) Before Shee, J., sitting in the Bail Court. The case of the *Queen* v. *Rycroft and Others, Justices of Kent,* which involved the same point, was argued with the principal case.

(2) 29 L. J. (M. C.) 175 n.

(3) 29 L. J. (M. C.) 107.

(4) 30 L. J. (M. C.) 223.

1866

THE QUEEN v. LAMBARDE.

SHEE, J. I am of opinion that this case is within the provisions of 20 & 21 Vict. c. 43, and therefore the justices are bound to state a case.

*Rule absolute.*

Attorneys for prosecution: *Shaen & Roscoe.*
Attorneys for defendants: *Holcroft & Co.*

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[IN THE EXCHEQUER CHAMBER.]

*May* 7.

CHARLOTTE WINSOR *v.* THE QUEEN.

*Criminal law—Felony—Discharge of jury, effect of—Second trial—Writ of error—Witness—Admissibility of person jointly indicted.*

The record of a conviction for felony shewed that, on the trial of the indictment, the jury being unable to agree, the judge discharged them; that the prisoner was given in charge of another jury at the next assizes, and a verdict of guilty returned, and judgment and sentence passed. On writ of error:—

*Held*, affirming the judgment of the Court of Queen's Bench, that the judge had a discretion to discharge the jury, which a court of error could not review; that the discharge of the first jury without a verdict was not equivalent to an acquittal; that a second jury process might issue; and that there was no error on the record.

Where two prisoners are jointly indicted for a felony and plead not guilty, but one only is given in charge to the jury, the other is an admissible witness, although his plea of not guilty remains on the record undisposed of.

WRIT of error from the Court of Queen's Bench.

[The record is set forth *ante* p. 289. The assignment of errors was in substance the same as at p. 292.]

May 4 and 5, *Folkard* (*Collins* with him), for the plaintiff in error, urged the same arguments as in the Court of Queen's Bench; and in addition to the cases cited at pages 295, 296 referred to the following: Spelman's Life of Alfred, (Latin Ed.) p. 83, (*Cadwin's* case), Pettingal's Enquiry into the Use and Practice of Juries, 166. Mirror of Justice, ed. of 1768, 239. Hale Hist. of the Com. Law by Runnington 348. 9 Hen. 3, c. 12. 2 Viner's Abridg. Adjournment (I) 2. 3 Geo. 4, c. 10. 13 and 14 Vict. c. 25. Trials per pais 251. *Mounson* v. *West*, 1 Leon. 132. Finch B. 4, c. 36, Jenkins 187, case 84. *Reg.* v. *Newton*, 3 C. & K 87. Britton, edit. by

Kelham, 44. *Shea* v. *Reg.* 12 Ir. L. R. 153. *Powell* v. *Sonnett*, 3 Bing. 381, in error 1 Bligh (N. S.) 545. *Tinkler* v. *Rowland*, 4 A & E. 868. *Reg.* v. *Wilkes*, 4 Burr. 2527. *Reg.* v. *Bird*, 2 Den. C.C. 94. 29 Car. 2, c. 7.

He lastly contended that the evidence of Harris was improperly admitted. That in civil cases the improper reception of evidence could not be assigned for error, because the remedy was by a bill of exceptions; but as in criminal cases a bill of exceptions would not lie, neither could the question be raised by plea nor by demurrer, the only mode of raising it was by writ of error.

[*The Solicitor General*, contrà, observed that it did not appear on the record that Harris had been examined as a witness.

The Court ruled that as the fact did not appear on the record, any decision upon the point would be extra-judicial.]

He then moved for a certiorari to amend the record; and referred to Viner's Abridg. Error, (M.a.) "After in nullo est erratum pleaded the court to inform their consciences may award a certiorari to amend the record: Pasch. 11 Ja. B. R. *Bishop's* case, 5 Co. 37. b."

[The Court intimated that any matter which had been argued in the Court of Queen's Bench might be argued before them.]

He then urged that Harris was an approver and an accomplice; that she was an approver in the strict sense of the term; the jury on the previous trial had deliberated on her guilt; that she was still liable to be tried; the calling Harris as a witness was as much ground of error as if a juryman sat upon the jury without being sworn; which clearly would be ground of error. That in *Rudd's* case (1 Leach, C. C. at p. 118) Lord Mansfield pointed out that the law of approvement still remained a part of the common law, though by long discontinuance the practice of admitting persons to be approvers had now grown into disuse; (see also Kelham's translation of Britton, p. 39). That Harris could not be admitted as an approver till she had confessed the crime charged against her in the indictment, (2 Hawkins, P. C. ch. 24, sect. 8. Com. Dig. Justices. Approver (V. 1) 3 Ins. 129), he also cited 2 Hale, P. C. 228. That Harris ought to have confessed her guilt before she was called as a witness. That the record did not shew that she had, and as on the second trial a bill for murder

1866

WINSOR v. THE QUEEN.

against the plaintiff could not be presented to a grand jury, it was more important that the trial should be strictly conducted. He further urged that an accomplice who was jointly indicted and who had pleaded not guilty could not be called as a witness against the other prisoner. That in *Reg* v. *Lyons* (9 C & P., 555) Erskine, J., stated that he never heard of such a thing as an accomplice being examined as a witness where he was indicted in the same indictment, and at p. 557, that judge had cited a passage from Hale P. C. 118, that "when the accomplice has been joined in the indictment, and before the case comes on it appears that his evidence will be required, the usual practice is before opening the case to apply to have the accomplice acquitted." That in 3rd Vol. of Russell on Crimes, last ed., at p. 626, note (0), it was laid down "Mr. Starkie, 2 Stark. Evid. 11, says that 'an accomplice, as it seems, is a competent witness and may be examined if he be willing, although he is indicted along with the others, provided he be not on his trial at the same time with the others.' To which he adds a query, and refers to 1 Hale, 305, and *Rex* v. *Ellis* (Macnall, 53.) In a case in the Star Chamber between the King and several defendants it was ruled that if one of them does not accuse himself but accuses another defendant he shall not be received as a competent witness to condemn his companion, *Sir Percy Cresby's* case Noy 154, cited 2 Hale, 234." That this last passage shewed that Harris was an incompetent witness because she had not accused herself, for her plea of not guilty was on the record. That in *Reg.* v. *Jackson* (6 Cox, C.C. 525), two persons were indicted together and one pleaded guilty, the other was desirous of calling him as a witness on his behalf. Erle, J. would not admit of its being done until he was sentenced. That *Rex.* v. *Rowland*, (Ry. & M. 401,) and *Child* v. *Chamberlain* (6 C. & P. 213) were authorities to show that if Harris had been acquitted her evidence was admissible. That Harris could not be called as a witness for the plaintiff in error was clear from the authorities cited; if she could not give evidence on her behalf neither could she be called upon to give evidence for the Crown.

[The Court intimated that they should probably find it unnecessary to call upon the Solicitor General.]

*Cur. adv. vult.*

May 7th. *The Solicitor General* (*Hannen* with him), was not called upon.

The judgment of the Court (Erle C.J., Pollock, C.B., Martin, Bramwell, and Pigott, BB., and Byles, and Montague Smith, JJ.) was delivered by

ERLE, C.J. In this case it has been contended on behalf of the prisoner, the plaintiff in error, that the conviction appearing on the record is erroneous, because it appears thereon that the prisoner had been given in charge to another jury at a former assizes, who had come to no verdict and had been discharged by order of the judge, for reasons which were alleged to be insufficient in law. But we are of opinion that there is no error apparent on this record, and we have come to this conclusion, notwithstanding the arguments and authorities adduced by the learned counsel for the prisoner, because we find that the power of a judge to discharge a jury before verdict has been the subject of numerous adjudications, and that all the important arguments and authorities to which our attention has been now directed have been frequently collected and carefully discussed in those cases, and we consider that the strength of reasoning and the weight of authority lead us clearly to the conclusion above stated; and we refer to *Kinloch's* case (1), *Conway* and *Lynch* v. *Reg.* (2), *Reg.* v. *Newton* (3), *Reg.* v. *Davison* (4), *Reg.* v. *Charlsworth* (5), and *Winsor* v. *Reg.* (6), in the court below, as containing all that can be said on either side. We think it unnecessary again to go through an examination of the authorities and arguments upon which the judgments in the cases referred to were rested, all with one exception leading to the conclusion above stated. The exception is the decision in the case of *Conway* and *Lynch* (2), where the judgment of the majority was adverse to that conclusion. But Crampton, J., dissented from the rest of the court and gave a judgment, remarkable for sound reasoning and deep research, by which the propositions of law on which he relied appear to us to be clearly established. (7) We consider that the

(1) Foster C.C. 16.
(2) 7 Ir. Law Rep. 149.
(3) 13 Q. B. 716
(4) 2 F. & F. 250.
(5) 1 B. & S. 460; 31 L.J. (M.C.) 25.
(6) Ante 289.
(7) See the judgment of Crampton, J., 31 L. J. (M. C.) 46.

1866

WINSOR v. THE QUEEN.

doubts which have caused this repeated litigation originate in the unlimited terms used by Sir Edward Coke, in stating what he considered to be the rule of the common law relating to the discharge of juries before verdict, viz. "a jury sworn and charged in case of life or member, cannot be discharged by the court or any other, but they ought to give their verdict."(1) This rule if taken literally seems to command the confinement of the jury till death if they do not agree, and to avoid any such consequence an exception was introduced in practice which Blackstone has described by the words "except in case of evident necessity."(2)

But the exception so expressed has given rise to further doubts, because necessity is an equivocal word, meaning either irresistible compulsion or a high degree of need. Those who have been interested in objecting to a discharge of a jury before verdict, have disputed whether the discharge was necessary in the stricter sense of the word. The same dispute about the meaning of the word necessity in the exception to this rule is the source of the main questions raised upon this writ of error, and they are in substance answered when we decide on the meaning of that word in the exception to this rule, and apply that meaning to the facts appearing on this record. We assume it to be clear that the discharge of the jury before verdict may be lawful at some time and under some circumstances. Then with reference to the facts on this record, we hold that the judge at the first trial had by law power to discharge the jury before verdict, when a high degree of need for such discharge was made evident to his mind from the facts which he had ascertained. We cannot define the degree of need without some standard for comparison; we cannot approach nearer to precision than by describing the degree as a high degree such as in the wider sense of the word might be denoted by necessity. We hold further that the judge alone had to decide when the "necessity," in this sense of the word, for the discharge of the jury was made evident to him, and his decision thereon is not made subject to review by any legal tribunal. It was his duty to exercise his discretion both in ascertaining the relevant facts and in determining their effect in making the necessity for the discharge evident to himself. The lawfulness of the discharge depended upon

(1) Co. Litt. 227 b. (2) See 4 Bl. Com. 360.

the result of this exercise of his discretion, and the statement of that result upon the record is, in our judgment, sufficient to establish that the order for the discharge in question was lawfully made, and that the subsequent proceedings to trial and conviction are not rendered erroneous thereby. If the discharge of the jury was lawful all the grounds of error founded on the assumption that it was unlawful fail. The contention that the prisoner has a right after a trial has begun, and he has been given in charge to the jury, to demand that the trial should be continued till a verdict should be given, or, if that cannot be done, that he should be acquitted and discharged, cannot be maintained. There is no reason or authority for supporting such a contention; the failure of some of the jury to agree with the rest is distinct from a doubt entertained by the whole jury. If the notion could prevail that the failure of the jury to agree entitled the prisoner to an acquittal, it, of course, follows that any single juryman by refusing to agree could ensure an acquittal. Even if it was assumed, for the sake of argument, that the statement on the record led the judges of the court of error to the opinion that the order for the discharge in question was an improper exercise of discretion on the part of the judge who tried the case, still we should hold that such a discharge was no legal bar to a second trial either on the same or on a fresh indictment. The only pleas known to the law founded upon a former trial are pleas of a former conviction or a former acquittal for the same offence, but if the former trial has been abortive without a verdict, there has been neither a conviction nor an acquittal, and the plea could not be proved. That which would be matter of plea to a fresh indictment would be ground of error upon a second trial upon the same indictment. As far as relates to the former abortive trial, nothing which then took place could be ground of error on the second trial on the same indictment, unless it would have been a bar by way of plea to a new indictment for the same offence. All the authorities are concurrent to this effect with the single exception of the case of *Conway* and *Lynch* v. *Reg.* (1), and we have before given our opinion on that case. On these grounds we decide that there is no error apparent on this record and the judgment of the court below is affirmed.

(1) 7 Ir. Law Rep. 149.

1866

WINSOR v. THE QUEEN.

The learned counsel contended further that there was error in admitting Mary Ann Harris as a witness on the second trial in which the prisoner Winsor was alone given in charge to the jury. To this it was answered that it did not appear on the record that Mary Ann Harris was examined as a witness on the trial. The learned counsel then proposed to move for a certiorari in order that a statement of this fact might be added to the record, but we refused to grant the application, being of opinion that Mary Ann Harris was an admissible witness under the circumstances here stated, so that, if the facts were added to the record, and if the admissibility of the witness could be inquired into in the court of error, the alleged ground of error could not be sustained.

*Judgment affirmed.*

The Court made the following order as to the custody of the prisoner: "That the keeper of the gaol of Newgate present here in court, do re-deliver the said Charlotte Winsor, the plaintiff in error, into the custody of the sheriff of the county of Devon and keeper of Her Majesty's gaol for the said county."

Attorneys for plaintiff in error: *Burt & Stevens.*
Attorneys for the Crown: *Solicitors to the Treasury.*

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*May* 9.

THE WEARDALE DISTRICT HIGHWAY BOARD, APPELLANTS; BAINBRIDGE, RESPONDENT.

*Highway—Turnpike Trust—Application of Funds—Order of Justices for contribution out of highway rates—4 & 5 Vict. c. 59, s. 1.*

By a local act, subsequent to the 4 & 5 Vict. c. 59, all the moneys coming to the hands of the trustees of a turnpike road were to be applied, first in defraying the expenses of management, not exceeding 300*l.* in any one year; secondly in maintaining the road, the amount not to exceed 1600*l.* in any one year; and, lastly, in paying off the debt due by the trustees. The annual revenue of the trustees exceeded 1900*l.*, and the expenses of management and maintaining the road fell short of 300*l.* and 1600*l.* respectively, so that there was a small surplus applicable to the reduction of the debt; but the trustees, wishing to expend a larger sum than this surplus on the latter purpose, applied to justices, under the 4 & 5 Vict. c. 59, s. 1, to make an order upon a highway board to contribute out of the highway

rates towards the maintenance of the part of the road in their district, on the ground that the funds of the turnpike trust were not sufficient:—

*Held*, that the trustees were bound to apply their funds in the order and to the extent provided by their act; and that the 4 & 5 Vict. c. 59, could not override the subsequent local act; and that the trustees were not entitled to the order they asked for.

*Reg.* v. *White* (1) distinguished.

CASE stated by justices of Durham, under the 20 & 21 Vict. c. 43.

At a petty sessions holden on the 20th October, 1865, the respondent, as clerk to the trustees of the Alston Roads Trust, exhibited an information under the 4 & 5 Vict. c. 59, alleging that the funds of the trust were insufficient for the repairs of the roads comprised therein, part whereof is situate within the township of Forest, which is included within the Weardale Highway District, that the said part of the road was out of repair, and applying for an order for the appropriation of such portion as the justices might think necessary of the highway rate levied or to be levied in the said township, towards the repairs of the said part of the said road.

An order was made accordingly by the justices that the sum of 10*l.* should be paid by the appellants to the trustees of the Alston Roads Trust.

The following is a statement of the chief facts and arguments, &c., brought before the justices upon the hearing of the information.

By the Alston Roads Act, 1853, 16 & 17 Vict. c. cxii., after repealing the former local act, 5 Geo. 4, c. xxxiv., it is enacted, s. 22—That all arrears of interest due on the principal sums or debts owing on the said turnpike trust should be and the same were thereby wholly extinguished; and by s. 24, that all moneys which shall come to the hands of the trustees by virtue of this act shall be applied as follows:—1. In paying and discharging the expenses of obtaining and passing this act, or incident thereto. [These have been discharged.] 2. In defraying the expenses of erecting, altering, and repairing toll gates and toll houses, and of the management of the said roads, and the salaries of officers and other incidental expenses, but not exceeding in any one year the sum of 300*l.* exclusive of payments to toll collectors, and of the costs of prosecuting or defending any claims or suits. 3. In

(1) 4 Q. B. 101.

1866

WEARDALE HIGHWAY BOARD v. BAINBRIDGE.

maintaining and repairing the roads and bridges, and putting this act in execution with reference thereto, but so that the amount expended for these purposes shall not exceed 1600*l.* in any one year. [4 & 5, in paying certain specific debts which have been discharged.] 6. In paying, without interest, in manner hereinafter provided, the other principal sums named in the third part of the schedule hereunto annexed, now due on the credit of the tolls arising on the said roads. Lastly, in maintaining, repairing, and improving the said roads. By s. 26 it is enacted that when and so often as the moneys applicable to the discharge of the said principal sums respectively shall amount to 200*l.*, the trustees shall apply the same in payment in manner therein mentioned (and to such of the creditors as should from time to time accept the lowest composition in respect of their debts) of a proportionate part of such principal moneys. And by s. 35, that this act shall commence on the 1st day of November next (1853), and shall continue in force for the term of twenty-one years, and from thence to the end of the session of parliament which shall then next follow.

There is due on the credit of the said tolls the sum of 27,789*l.* 15*s.* 11*d.* The annual revenue from tolls and incidental receipts of the trust for the current year will amount to 2208*l.* The salaries of the officers and the other expenses of the management of the trust will amount for the current year to 272*l.* The expenses of maintaining and repairing the roads and bridges, and putting the act in execution in reference thereto during the present year, are estimated by the surveyor at 1596*l.*, of which 57*l.* will be expended within the township of Forest, the estimate being founded upon the actual expenditure within each parish during the past year. Thus leaving, according to the appellants' contention, 340*l.*, and no more, to be applied to the reduction of the debt.

There are 100 miles of road included within the Alston Trust, and four and a quarter miles of the trust road are within the township of Forest.

The 4 & 5 Vict. c. 59 (an act to authorise for one year the application of a portion of the highway rates to turnpike roads, continued by subsequent acts, and by 23 & 24 Vict. c. 67, to the

end of the next session of parliament after October, 1865), after reciting the General Highway Act of 5 & 6 Wm. 4, c. 50, whereby divers statutes passed in the reign of George 3rd., relating to the performance of statute duty were repealed, and that statute duty was thereby altogether abolished; and that the revenues of some turnpike roads are so unequal to the charge and maintenance of such roads, after paying the interest and principal of the sums due upon mortgage of the tolls thereof, when deprived of the aid heretofore derived from statute duty, that it is necessary that some additional provision should be made for such roads for a limited period, enacts (s. 1) that justices, upon information exhibited before them by the clerk or treasurer of any turnpike trust that the funds of the said trust are insufficient for the repairs of the turnpike roads within any parish, &c., may examine the state of the revenues and debts of such turnpike trusts, and inquire into the state and condition of the repairs of the road within the same, &c., and if after such examination it shall appear to the said justices necessary or expedient for the purposes of any turnpike road so to do, then they may adjudge and order what portion (if any) of the highway rates, &c., shall be paid by the parish surveyor, &c., to the said trustees, such money to be wholly laid out in the actual repairs of such part of such turnpike road as lies within the parish from which it was received. By 26 & 27 Vict. c. 94, s. 1, the highway board is substituted for the parish surveyor.

It was contended, on behalf of the appellants, that the 4 & 5 Vict. c. 59, only applies to cases where the funds of the turnpike trust are insufficient for "the repairs of the turnpike roads in any parish"; and that as the trustees of the Alston roads are directed by their act to expend a sum not exceeding 1600*l.* in maintaining and repairing the roads and bridges, and the estimated expenditure for those purposes for the current year only amounts to 1596*l.*, the funds are not insufficient for the repairs of the roads. That the trustees are not entitled to an order for parish composition, unless their estimated expenditure for repairs, &c., exceeds 1600*l.*, the amount directed by their local act to be so expended. That if, as they contend, the trustees are justified in stopping short at 1200*l.*, in repairs of their roads, they would be equally justified in stopping short at 800*l.*, or even a less sum than that, and asking

1866

WEARDALE HIGHWAY BOARD v. BAINBRIDGE.

for parish composition to double or treble the sum applied for at present.

On behalf of the respondent it was contended that although the 4 & 5 Vict. c. 59, only applies to cases where the funds of the turnpike trust are insufficient for the repairs of the turnpike roads in any parish, &c., yet that in judging of the sufficiency or insufficiency of the funds for this purpose, the whole state and circumstances of the trust must be taken into consideration by the justices, and that if there is a debt due upon the trust (as in the present case), the justices are to consider that it is a duty incumbent upon the trustees of the turnpike trust to have a due regard to the discharge of such debt concurrently with keeping the trust roads in repair. That this view is supported by the express language of the statute 4 & 5 Vict. c. 59, and the preamble thereto, where the discharge of turnpike trust debts is distinctly recognised as one of the matters to be taken into account by the justices. That also the Alston Roads Act itself distinctly recognises the debt due upon the Alston trust, and makes special provisions in sections 24 & 26 for the due discharge thereof. That under the 24th section of their act the trustees are justified (and which is what they in reality do) in stopping at any sum short of 1600*l.* in the repairs of their roads (say, for example, 1200*l.*) that they may consider prudent, having a proper regard to the concurrent discharge of the debt due upon their trust, and that as this 1200*l.* is insufficient to keep their roads, including that part within the township of Forest, in repair (the estimate being 1596*l.*), the funds of the Alston Roads Trust are insufficient for the repairs of the roads.

That, according to the appellants' own statement, the yearly surplus applicable to the discharge of debts amounts to the sum of 340*l.* only; that this amount, without the assistance of the parish compositions towards the repairs of the roads, is far from sufficient to enable the debts of the Alston Trust, even at the past rate of per centage, or rate of composition accepted by the creditors, to be paid off within the term of their act. That it is well known that one object of the legislature is to have the debts due upon turnpike trusts discharged either wholly or to as great an extent as possible.

The question for the opinion of the Court was, whether the

judgment of the justices was, in point of law, correct, and whether the trustees can call upon the highway board, under the circumstances of this case, to pay to them a portion of the highway rate levied in the township of Forest.

If the Court should be of opinion that the order was legally and properly made, then the order was to stand; but if the Court should be of opinion otherwise, then the information was to be dismissed.

May 2. No one appearing for the respondent, the Court called upon

*Besley*, for the appellants. The trustees propose to misapply their funds by expending more than the surplus applicable after the proper distribution to the reduction of their debt; and then by that means having caused a deficit, they seek to say the funds are insufficient to repair the roads, and that they are entitled to have an order granted on the neighbouring parishes to make good the deficit out of their highway rates. This is, in effect, repealing the local act by force of a prior statute. There is nothing in the 4 & 5 Vict. c. 59 to justify such a course. The distribution provided by the local act must be strictly followed; *Mawby* v. *Hopkinson*. (1)

In a subsequent part of the day the Court consented to hear

*C. Russell*, for the respondent. It is true that the 16 & 17 Vict. c. cxii. prescribes the order in which the funds are to be applied; but the preamble of the 4 & 5 Vict. c. 59, shews that the state of indebtedness of the trust is to be looked at, and the justices may make an order if, in their discretion, they think it desirable, notwithstanding the funds would be sufficient for the repair of the road if the local act were strictly complied with. This point was expressly decided in *Reg.* v. *White* (2), which is undistinguishable from the present case. There was no limit to the power of justices to require statute duty or composition for it, nor any restriction in respect of the sufficiency of the funds of the trust, as is pointed out in *Reg.* v. *White*. (2)

[BLACKBURN, J., referred to *Reg.* v. *South Shields* (3) as commenting on *Reg* v. *White* (2).]

*Reg* v. *White* (2) is not overruled by *Reg.* v. *South Shields* (3); on

(1) 10 L. T. (N.S.) 27. (2) 4 Q. B. 101.
(3) 3 E. & B. 599; 23 L. J. (M. C.) 134.

1866

WEARDALE HIGHWAY BOARD v. BAINBRIDGE.

the contrary, the latter case at least shews that the justices have a discretion to make the order. *Mawby* v. *Hopkinson* (1) is no authority one way or the other; in that case all that was decided, if a decision could be wanted on such a point, was, that the trustees, having strictly followed their local act in the application of their funds, were entitled to an order, though they had already expended the sum limited by the act in the first instance upon the repairs, that sum being insufficient for the repairs.

*Besley* in reply. *Reg.* v. *White* (2) has not been approved. There are many cases since, which shew that the trustees, in order to be entitled to an order, must follow their local act, and not first misappropriate the funds and then apply to justices on the ground that the funds were not sufficient for the repairs. In *Reg.* v. *South Shields* (3), Lord Campbell, C.J., delivering the judgment of the Court, says :—"We answer the question, whether the trustees had by law power to apply their funds in payment of arrears of interest before the necessary repairs of the road were paid for, in the negative, and affirm the order of sessions quashing the order of justices. Under the local act the duty of the trustees was to apply their funds to repairs before they paid any interest; and it is to be seen whether that duty has been altered by any subsequent statute. The 4 & 5 Vict. c. 59, giving justices a discretionary power to make an order on townships for payments to trustees of turnpikes when their funds are found insufficient for repairs, does not alter the duties of the trustees, nor give them a right to apply their funds otherwise than as directed by their local act."

[BLACKBURN, J. The effect of *Reg.* v. *South Shields*, (3) with the explanation given in it of *Reg.* v. *White* (2), seems to be that the justices have a discretion to make the order, notwithstanding the deficit is made by a misappropriation of the funds, though, in such case, the sessions would very properly reverse the decision.]

The object of the 4 & 5 Vict. c. 59, is, not to facilitate the payment of the debts of the turnpike trust, but to prevent the roads being left out of repair. To allow the trustees to apply their

(1) 10 L. T. (N.S.) 27. (2) 4 Q. B. 101.
(3) 3 E. & B. at p. 605; 23 L. J. (M.C.) at p. 136.

funds illegally for the reduction of the debt is simply to pay the creditors of the trust at the expense of the parishes, as is pointed out by the Court in the analogous case of *Chatham* v. *Rochester*. (1) In *Brown* v. *Evans* (2), it is assumed throughout, that the justices would not be justified in making an order without an inquiry as to the appropriation of the funds, if evidence were tendered of misappropriation.

*Cur. adv. vult.*

May 9. The judgment of the Court was delivered by

BLACKBURN, J. In this case, which was argued before my Brother Shee and myself, the question was whether the justices were right, under the circumstances stated in the case, in making an order, under the 4 & 5 Vict. c. 59, on the appellants to pay the trustees of the Alston Roads a portion of the highway rates.

By the local act regulating the Alston Roads (16 & 17 Vict. c. cxii., s. 24), it is enacted that all the moneys coming to the hands of the trustees by virtue of the act shall be applied, first, in paying the expenses of obtaining the act (which have been discharged); secondly, in defraying the expenses of management, not exceeding in any one year 300*l.*; thirdly, in maintaining and repairing the road, &c., but so that the amount expended for those purposes shall not exceed 1600*l.* in any one year; and then in paying off a large debt owing by the trustees: so that it is clear that the legislature intended that to the extent of 1900*l.* the management and repairs should be a charge on the trust funds prior to the debt.

The facts are that the revenue of the trustees exceeds 1900*l.*, and the expenses of management and maintaining the roads fall short of that sum, so that there is a surplus, though a small one, applicable to the reduction of the debt; but the trustees think it proper to apply a larger sum to reducing the debt, and they have obtained an order from the justices requiring the appellants, on behalf of the township of Forest (amongst other parishes), to defray part of the expenses of the maintenance of the road, on the ground that the funds of the turnpike trust, (which are sufficient to repair the road if the trustees obey the act of parliament, and

(1) Ante p. 24. (2) 34 L. J. (M.C.) 101.

1866

WEARDALE HIGHWAY BOARD v. BAINBRIDGE.

apply their funds primarily to those purposes to the extent of 1900*l.*), will not be sufficient if they disobey that act, as they propose to do, and apply the funds to reduce the debt. *Reg.* v. *White* (1) was very properly relied upon by the counsel for the respondent. If the present case was not distinguishable from that case, we should probably have required the case to be re-argued before the Court when more full before dissenting from a decision in point; but we think that that case is very different from the present. The terms of the local act were hardly so express as those of the present act; and it might be thought that the subsequent general act repealed, or at least overrode, the prior local act. But in the present case the legislature have, by an enactment subsequent to the general act, and therefore not repealed by it, in express terms provided in what order the funds of the trust should be applied; and we think it impossible to hold that the justices or trustees can have any power to alter that arrangement.

For this reason, we give judgment for the appellants.

*Judgment for the appellants, without costs.*

Attorneys for appellants: *Nethersole & Speechly.*

Attorneys for respondent: *Clarke, Son, & Rawlings.*

(1) 4 Q. B. 101.

NOTT, APPELLANT; BOUND, RESPONDENT.

1866
*April* 25.

*Church-rates—Charges for distress—Liability of bailiff to penalties*—53 *G.* 3, *c.* 127, *s.* 7—57 *G.* 3, *c.* 93, *ss.* 1 & 2, *and schedule*—7 *&* 8 *G.* 4, *c.* 17, *s.* 1.

By 53 G. 3, c. 127, s. 7, church-rates to the amount of 10*l.* may be inforced under a warrant of two justices, by distress and sale (appraisement not being made necessary) of the defaulter's goods, returning the overplus, after deducting the necessary charges. By 57 G. 3, c. 93, s. 1, the costs of distress for rent not exceeding 20*l.* are limited to the sums set forth in the schedule; by s. 2 any person who levies, takes, or retains from the produce of the goods sold under the distress, any other or greater charges than are mentioned in the schedule, or makes any charge for anything mentioned in the schedule and not really done, may be adjudged by a justice to pay treble the amount so unlawfully taken. In the schedule 6*d.* in the pound is allowed for appraisement. By the 7 & 8 G. 4, c. 17, the provisions, penalties, &c., of the 57 G. 3, c. 93, are to extend, be applied, and put in execution, so far as the same are applicable and capable of being put in execution, with respect to any distress for poor-rates, church-rates, &c., when the sum does not exceed 20*l.*, and the two acts are to be read together.

The respondent being charged with a warrant of distress to enforce the amount of a church-rate under 10*l.* from the appellant, levied on his goods, and sold them by private contract; but afterwards bonâ fide thinking this course erroneous, he induced the purchaser to rescind the contract, and then sold the goods by auction, after appraisement, &c. He retained (inter alia) the amount paid for appraisement, under 6*d.* in the pound, and tendered the overplus to the appellant:—

*Held*, that the respondent was not liable to be convicted under the 57 G. 3, c. 93, s. 2; for that, though he had been mistaken, he had acted bonâ fide, he had not taken other or greater charges than were allowed by the schedule, nor charged for what was not really done.

CASE stated by justices of Herefordshire under the 20 & 21 Vict. c. 43.

The appellant laid an information against the respondent, for that he at, &c., sold certain goods of the appellant to satisfy a church-rate for the parish of Wigmore and costs levied by distress on the said goods, and that he retained or took from the produce of the goods certain unlawful charges and costs, to wit, for appraisement and stamp, keeping possession five days, printer for bills for sale by auction, for removal of goods to place of sale, delivery, stamps, &c., against the statutes 57 G. 3, c. 93, and 7 & 8 G. 4, c. 17.

On the hearing it appeared that an order of justices was made upon the appellant for the payment of 1*l.* 11*s.* 3½*d.*, the amount of

1866

NOTT v. BOUND.

a church-rate for the parish of Wigmore, with costs; and the amount not having been paid, a warrant of distress and sale of the appellant's goods was issued, for the said 1*l.* 11*s.* 3½*d.* rate, 7*s.* 6*d.* costs, 2*s.* copy warrant, and 3*s.* levy.

On the 3rd day of May the warrant was executed by the respondent, who is a police constable at Wigmore, and he seized two hams and two flitches of bacon, the goods of the appellant, at his house at Wigmore, and shortly afterwards, on the same day, took them to his house, called the police station, at Wigmore, at which he resided, and kept them there until the 9th of May. On that day the goods were taken by him and Henry Humphries, one of the churchwardens, to Aymestrey, about two miles from Wigmore, and he paid the sum of 2*s.* 6*d.* to Henry Humphries for the use of the horse and cart by which they were conveyed; the goods were then sold by the respondent by private contract to John Norris at Aymestrey for 6*l.* 17*s.* 0½*d.*, which sum was then paid by him to the respondent, who thereupon delivered the goods to the purchaser; at the time of such sale and purchase, the respondent informed Norris that the goods had been seized on a distress for church rates. After this sale had been effected, the respondent was informed that he had done wrong in selling the goods in the way he had, and that he ought to have sold them by auction, and should have had them appraised before they were sold; believing that this was so, the respondent, on the next day, the 10th of May, called on Norris, and stated that he was afraid he had made some mistake in the sale, and requested Norris not to part with the goods until he heard further from him, and inquired if he would rescind the sale, which Norris agreed to do; and on the following day, the 11th of May, the respondent went again to Norris, returned to him the purchase-money of 6*l.* 17*s.* 0½*d.*, and received again from him the goods sold.

Upon the same day the respondent caused the bacon to be appraised; the appraisement was properly made, and was written upon a 2*s.* 6*d.* stamp. He also caused bills offering the goods for sale by auction to be printed and circulated in Aymestrey. Upon the same day they were sold by auction. They produced 7*l.* 11*s.* 4*d.*, and the purchase-money was paid to the respondent.

The justices were of opinion that an appraisement and sale by

auction were not necessary, but they found as a fact that the respondent acted bonâ fide, and in the honest belief that they were necessary, and they also found that the first sale was rescinded by the mutual agreement of both the respondent the vendor, and Norris the purchaser.

Some weeks after the sale by auction, the respondent delivered the following account, signed by him, of his charges, &c., under the distress to the appellant, tendering him the residue of 3*l.* 16*s.* 9*d.* which he refused to receive:—

Account of sale of goods seized under warrant of distress, wherein the churchwardens of the parish of Wigmore were complainants and Charles Nott defendant:—

| | £ | *s.* | *d.* | £ | *s.* | *d.* |
|---|---|---|---|---|---|---|
| Amount realised by sale of goods | | | | 7 | 11 | 4 |
| Amount of rate | 1 | 11 | 3½ | | | |
| Costs of order | | 7 | 6 | | | |
| Distress warrant | | 2 | 0 | | | |
| Levying distress | | 3 | 0 | | | |
| Appraisement 3*s.* 10*d.*, including stamp 2*s.* 6½*d.* | | 6 | 4½ | | | |
| Keeping possession five days, paid printer for bills for sale and advertisements, and paid auctioneer for sale by auction, paid removal of goods to place of sale and delivery stamps, &c. | 1 | 4 | 5 | | | |
| | | | | 3 | 14 | 7 |
| Balance | | | | £3 | 16 | 9 |

The charge of 6*s.* 4½*d.* for appraisement and stamp and so much of the item of 1*l.* 4*s.* 5*d.* as was charged for printer for bills for sale and advertisements, and paid auctioneer for sale by auction, relates to the sale by auction only; but that item includes the sum of 2*s.* 6*d.* for the removal of the goods upon the occasion of the first sale.

The respondent made the following statement at the hearing in support of the item of 1*l.* 4*s.* 5*d.* He contended that he was authorized to charge as follows:—

| | *s.* | *d.* |
|---|---|---|
| Man in possession five days, at 2*s.* 6*d.* | 12 | 6 |
| Advertisements (paid printer) for bills | 4 | 6 |
| Do. distributing bills | 2 | 6 |
| Sale and commission and delivery of goods (1*s.* in the pound on the produce) | 7 | 6 |
| | £1 | 7 | 0 |

being 2*s.* 7*d.* more than he charged in account.

1866

NOTT v. BOUND.

The charge of man in possession is for the respondent himself keeping the said goods at the police station from the 3rd to the 9th of May.

The respondent actually paid 2*s.* 6*d.* for removing the goods to Aymestrey, 4*s.* 6*d.* and 2*s.* 6*d.* for the advertisements, and to the auctioneer 1*l.* 10*s.* for second sale.

On the part of the appellant two objections were made to the foregoing charges—First, that the warrant of distress was exhausted by the bill of sale to Norris on the 9th of May, to whom the property in the goods then passed, and that the subsequent sale was null and void so far as the appellant was concerned, and was neither a sale under the distress warrant nor a sale of the goods of the appellant Nott, but of the goods of Norris, or of the respondent, who had made them his own by purchase, and that the charges for appraisement and sale were therefore for things not done in the sale of the goods of Charles Nott. That the respondent had made no mistake in selling by private contract without appraisement, and that even if he had made any mistake it was not in his power to cancel it by a re-sale of the goods. And secondly, that with respect to the charges for man in possession, although it related to what took place before the first sale, it was illegal because the goods were removed from the house of the respondent, and no man was left in possession, which is the event contemplated by the act of parliament as above, justifying the charge, and that the only lawful charge was 4*d.*, for impounding under 1 & 2 P. & M. c. 12, s. 2.

On the part of the respondent it was contended that he was not concluded by anything he did prior to his delivering the signed account required by the statute (1), and if he had made a mistake upon the occasion of the first sale, or honestly believed that he had done so, he had a right to rectify his error, or supposed error, by procuring the first sale to be rescinded if the original purchaser was willing to rescind it; and it was urged that the appellant was in no way injured as the second sale realized considerably more than the first. With regard to the possession it was argued that "Man in possession" meant in possession of the goods wherever they may be, and that the defendant, who was a bailiff under the warrant,

(1) See 57 G. 3, c. 93, s. 6.

had a right to use his own house as a pound for this purpose, and to charge for his own services.

It was also argued on behalf of the respondent that even if some of the items (such as the appraisement) were not necessary, and ought not to have been charged by him, still as they were items specified in the schedule to the act, 57 Geo. 3, c. 93, and were also for things "actually done," the respondent could not be convicted under the statute for making them, but that the appellant should seek his remedy (if any) by action.

The justices dismissed the summons with costs on the following grounds, the majority being of opinion—1st, that the respondent whilst acting bonâ fide had a right to rescind the first sale and to sell again, and that such first sale was mutually rescinded by both vendor and purchaser. 2nd, that the respondent did not retain or take any other or greater costs and charges than are mentioned in the schedule to the act or make any charge for any act not really done. 3rd, that if the respondent did include any items in his charges which were not necessary, still they were all enumerated in the schedule to the act, and being made for things actually done, the justices had no power to convict.

One of the justices who heard the case differed from that decision, and was of opinion that the warrant was exhausted by the first sale; and that the second sale was null and void.

The question for the Court was, whether the respondent ought to have been convicted in respect of any of the items of charge made by him, and if so, for which.

*Hayes, Serjt.*, for the appellant. By the 53 G. 3, c. 127, s. 7, church-rates to the amount of 10*l.* may be enforced under a warrant of two justices, by distress and sale of the defaulter's goods, returning the overplus after deducting the necessary charges, but appraisement is not required as on sale of a distress for rent by the 2 W. & M., Stat. 1, c. 5, s. 2. By the 57 G. 3, c. 93, s. 1, the costs of distress for rent not exceeding 20*l.*, are limited to the sums set forth in the schedule. And by s. 2 any person who levies, takes, or retains from the produce of the goods sold under the distress any other or greater charges than are mentioned in the schedule, or makes any charge for anything mentioned in

1866

NOTT v. BOUND.

the schedule and not really done, may, on the complaint of the party aggrieved, be adjudged by a justice to pay treble the amount so unlawfully taken. In the schedule 2*s.* 6*d.* a day is allowed for the man in possession, 6*d.* in the pound for appraisement, the expense of advertisement 10*s.*, and 1*s.* in the pound of the net produce of the sale for catalogues, sale, and commission. By the 7 & 8 G. 4, c. 17, s. 1 (1), the provisions, penalties, &c., of the 57 G. 3, c. 93, are to extend and to be applied, and put into execution, so far as the same are applicable and capable of being put into execution, with respect to any distress for land tax, poor-rates, church-rates, &c., where the sum demanded and due does not exceed 20*l.*; and the two acts are to be read together. Now, as on a sale for distress for church-rates, no appraisement was necessary, the schedule in the 57 G. 3, c. 93, must be read as applicable to the 7 & 8 G. 4, c. 17, that is with no mention of

(1) 7 & 8 G. 4, c. 17. "Whereas by the 57 G. 3, c. 93, an act for regulating the costs of distresses for payment of small rents, certain regulations are made with respect to the costs and charges of levying and disposing of such distresses, when the sum demanded and due shall not exceed 20*l.*; and whereas it is expedient that the said act should be amended by extending the same to distresses for other causes, be it enacted that all the rules, regulations, clauses, provisions, penalties, matters and things, in the said act contained, shall extend and be construed to extend, and shall be applied and put in execution so far as the same are applicable and capable of being put in execution, with respect to any distress or levy which shall be made for any land tax, assessed houses, poor-rates, church-rates, tithes, highway rates, sewer-rates, or any other rates, taxes, impoundings, or assessments whatever, in all cases where the sum demanded and due for, or in respect of such taxes, &c., shall not exceed 20*l.*, and in all cases where the whole of the amount sought to be levied by distress taken for different purposes at the same time shall not exceed 20*l.*, and that such costs and charges, and no other, shall be taken and payable as the costs and charges of the levy and disposition of such distresses; and that all such proceedings shall and may be had and taken against all persons transgressing the regulations of the said act in the levying or distraining of such taxes, &c.; and all such persons shall be liable to and incur the like penalties as by the said act are directed and imposed with respect to persons making any distress for rent contrary to the directions of the said act; and that in any order or judgment of the justices before whom any complaint shall be preferred in consequence of this act, such order shall be expressed to be made upon a complaint for a breach of the said recited act, as amended by this act, and that the said recited act and this act shall be taken and construed as one act to all intents and purposes whatsoever."
See 57 G. 3, c. 93, s. 6.

appraisement in it, and thus the respondent is subject to the penalties imposed for making charges other than those in the schedule. Secondly, the warrant of distress was exhausted by the sale to Norris, and consequently no charge could be made for anything done afterwards. In either view the respondent ought to have been convicted.

*Harington*, for the respondent, was not heard.

BLACKBURN, J. I am of opinion that the majority of the justices were right. The act which regulates the costs of distress for small rents, 57 G. 3, c. 93, enacts that no person shall take other or higher charges than are fixed and set forth in the schedule, and that if any person shall take or retain other than mentioned in the schedule, or make any charge for anything mentioned in the schedule and not really done, he shall be liable to be fined treble the amount; and the 7 & 8 G. 4, c. 17, extends the provisions and penalties in the former act to distresses for rates and taxes to the amount of 20*l.*, so far as they are applicable or capable of being put in execution. The respondent, the bailiff employed to levy a distress for a church-rate, acting under those statutes, thought, not unnaturally, that he ought to have an appraisement and other matters of detail, and he charged for the appraisement, &c., sums below the rate fixed in the schedule. Now it is found expressly that he acted perfectly bonâ fide in this matter, and that if he has incurred any charges not necessary or strictly lawful, still all the charges that he has made are for things enumerated in the schedule, and within the limited rate; and he has not charged for anything not actually done: he is therefore not within the intention of this act imposing a penalty of treble the excess charged. If he had charged for what he had not really done or made other or larger charges than those allowed in the schedule, he would be within this act. As it is, he may be liable to be made to refund, by an action in the county court, charges which were unnecessary or not strictly lawful, but he is not liable to the treble penalty.

SHEE, J., concurred.

*Determination affirmed.*

Attorney for appellant: *John Bennett.*

Attorney for respondent: *Thomas Westall.*

1866
*May* 10.

REEVES AND ANOTHER *v.* WATTS.

*Debtor and creditor—Composition deed—Bankruptcy Act*, 1861, 24 & 25 *Vict.* c. 134, s. 192—*Party to indenture by description.*

A deed of composition—being an indenture made between the debtor A.W. of the first part and all the creditors of A.W. of the second part, by which the debtor covenants with the several persons parties thereto of the second part respectively, to pay a certain composition on their respective debts unto the several persons parties &c., being all and every his present creditors; and the several creditors parties thereto &c. release their several debts, &c.—is a valid deed under section 192 of the Bankruptcy Act, 1861, and binding on non-assenting creditors; for every creditor is made a party by the general description of all the creditors of A. W., and can therefore sue on the covenant.

*Gresty* v. *Gibson* (1) followed.

DECLARATION by the plaintiffs as indorsees against the defendant as acceptor of a bill of exchange, dated 1st February, 1865, at four months.

Plea, that the defendant's liability was released by a deed of composition, under s. 192 of the Bankruptcy Act, 1861.

Replication setting out the deed at length; and alleging that two of the creditors executed the deed, but that the plaintiffs neither were parties to it nor executed it.

The deed was an indenture made 3rd April, 1865, between Alfred Watts, the defendant, of the first part, "and all the creditors of the said A. W. of the second part;" and recited that the deed was intended to relate to the liabilities of the defendant, and his release therefrom, and to be registered under s. 192 of the Bankruptcy Act, 1861, and to operate equally for the benefit of and to bind all the creditors, whether they assented to it or not; and witnessed, that the defendant covenanted with the said several persons parties thereto of the second part respectively, that he would pay unto the said several persons parties thereto of the second part, being all and every the present creditors of the said A. W., a composition of 10s. in the pound on the amounts of their respective debts, by three instalments, in the manner thereinafter mentioned, &c. And in consideration of the above covenant the said several creditors parties thereto of the second part re-

(1) Law Rep. 1 Ex. 112.

spectively released and discharged the defendant from all and singular the debts, sums of money, bills, bonds, notes, liabilities, claims, &c., which they the said creditors parties thereto of the second part severally had against him; and it was expressly declared that the creditors of the defendant should be equally bound by and entitled to the benefit of the indenture, although they might not assent thereto or approve thereof.

Demurrer and joinder.

*J. Brown, Q.C.* (*Eyre Lloyd* with him), in support of the demurrer. The only objection relied on by the plaintiff is that the deed is invalid under s. 192 of the Bankruptcy Act, 1861, because the non-assenting creditors cannot take advantage of the covenant, not being named as parties to the deed. But the parties of the second part are *all* the creditors, and that is sufficient to make each creditor a party. This point is expressly decided by the Court of Exchequer in *Gresty* v. *Gibson* (1), following *Lay* v. *Mottram* (2), in the Common Pleas. And the case of *Ex parte Cockburn* (3) must be taken as overruled so far as it bears on this point. *Dewhirst* v. *Jones* (4) is also an authority for the defendant.

The Court then called upon

*C. H. Hopwood*, for the plaintiff. *Gresty* v. *Gibson* (1) was founded on a mistaken view of *Lay* v. *Mottram*. (2) In that case the only question raised was that there was no covenant at all by the debtor to pay, and the Court held, on the authority of *Farrall* v. *Hilditch* (5), that the recitals were sufficient to imply a covenant. The present point was not made by the counsel for the plaintiff, who would doubtless have raised it had it been open to him; and it appears from the recital that there was a schedule of creditors attached to the deed, and the plaintiff's name was probably in it.

[BLACKBURN, J. Why are we to assume that? The deed, as set out in the report, is between all the creditors, without any reference to the schedule. Why should we assume a fact contrary to what appears, in order to make out the Court of Exchequer to have been mistaken in a decision which seems so desirable?]

(1) Law Rep. 1 Ex. 112.
(2) 19 C. B. (N.S.) 479.
(3) 33 L. J. (Bank.) 17.
(4) 3 H. & C. 60; 33 L. J. (Ex.) 294.
(5) 5 C. B. (N.S.) 840; 28 L. J. (C. P.) 221.

1866

REEVES v. WATTS.

In *Martin* v. *Gribble* (1), Pollock, C.B., while admitting that an opposite conclusion might have been come to, felt bound by the decision of the Lord Chancellor in *Ex parte Cockburn.* (2) *Ex parte Rawlings* (3); *Ex parte Godden* (4); *Ex parte Cockburn* (2); *Ilderton* v. *Jewell* (5); *Lyne* v. *Wyatt* (6); *Benham* v. *Broadhurst* (7); *Martin* v. *Gribble* (1); *Chesterfield, &c., Colliery Company* v. *Hawkins* (8), are all cases in which deeds have been held invalid by reason of all the creditors not being able to take advantage of them.

[BLACKBURN, J. Except *Ex parte Cockburn,* all those cases were cases in which the deed was confined either to those creditors who executed the deed, or in some other way. The question here is, whether under a deed expressed to be made between the debtor and all his creditors an individual creditor can take advantage of it.]

Nothing is clearer than that by the English law no person can take advantage of a covenant in a deed inter partes unless he be *named* as a party: *Storer* v. *Gordon* (9); *Metcalfe* v. *Rycroft* (10); *Salter* v. *Kidgly* (11); *Scudamore* v. *Vandersteine* (12); *Berkeley* v. *Hardy* (13); *Bushell* v. *Beavan.* (14) In 2 Preston's Conveyancing, 394, it is said: "With reference to indentures between parties, it seems to be a general rule that no one can be considered as a party to a deed unless he be named as a party in the clause containing the names of the persons who are formally made parties." Again, in 8 Bythewood and Jarman's Conveyancing, 413: "On the general principle that a stranger to a deed cannot take the benefit of it, covenants in an indenture entered into with persons who are not parties confer no right of action on such persons, and where the deed is expressed to be made between the parties, the parties named are alone parties to the instrument."

(1) 34 L. J. (Ex.) 108; 3 H. & C. 631.
(2) 33 L. J. (Bank) 17.
(3) 32 L. J. (Bank) 27; 1 De G. J. & S. 225.
(4) 32 L. J. (Bank) 37; 2 De G. J. & S. 260.
(5) 33 L. J. (C.P.) 148; 16 C. B. (N.S.) 142.
(6) 34 L. J. (C. P.) 179; 18 C. B. (N.S.) 693.
(7) 34 L. J. (Ex.) 61; 3 H. & C. 472.
(8) 34 L. J. (Ex.) 121; 3 H. & C. 677.
(9) 3 M. & S. 308.
(10) 6 M. & S. 75.
(11) Carth. 77.
(12) 2 Inst. 673.
(13) 5 B. & C. 355.
(14) 1 Bing. N. C. 103, 120.

1866

REEVES v. WATTS.

[BLACKBURN, J. There is no doubt about the general proposition that when a deed is inter partes no one not a party can sue upon a covenant in it, although expressly for his benefit; but the question is, whether a person coming within the description, which includes a certain class of persons, can be made a party by such description. No authority beyond vague statements in text books has been cited which goes to shew that the parties to a deed cannot be ascertained by description, except perhaps *Ex parte Cockburn* (1); nor, on the other hand, has Mr. Brown cited any case contrà except *Gresty* v. *Gibson.* (2)]

[*Brown, Q.C.*, referred the Court to the case of *Maughan* v. *Sharpe* (3), handed to him by Morgan Lloyd, which was the case of an assignment of goods by an indenture made between W. Dolby of the one part and the City Investment and Advance Company of the other part, by which W. D. assigned the goods to the said company. The company was not a corporation, but the defendants being the only members of it, the Court held that the goods passed to them; and Williams, J., in his judgment, says: "With respect to the deed assigning the goods from Dolby to the defendants, it is said it is inoperative, because of the necessity to name a grantee to enable the deed to have an operation. I apprehend, however, that it is settled a grant may be good, though the grantee be not named by his christian name or surname. In Shep. Touch. 236, after stating the consequences of a mistake in the christian name or surname of the grantee, it is stated: 'And yet if the grant do not intend to describe the grantee by his known name, but by some other matter, then it may be good by a certain description of the person without surname or name of baptism;' and it is added, id certum est quod certum reddi potest. I am of opinion that the meaning of the grant in this deed is to convey the goods to the persons using the style and name of the City Investment and Advance Company. They may or may not be a corporation; but when it has been ascertained that the persons answering to that description are the defendants, the grant operates accordingly to convey the property to them."]

Granting that a covenant with persons by the description of a

(1) 33 L. J. (Bank) 17. (2) Law Rep. 1 Ex. 112
(3) 34 L. J. (C.P.) 19; see p. 24.

1866

REEVES v. WATTS.

firm or company is valid, it is a very different question whether a person can be made a party to a deed by so vague a description as "all the creditors of A. B." This is pointed out by Pollock, C.B., in *Gresty* v. *Gibson.* (1) That a person to be a party to a deed must be named is further shewn by the 8 & 9 Vict. c. 106, s. 5, which enacts that a person may take an immediate estate or advantage of a covenant relating to real estates under an indenture, although not *named* a party in the instrument.

BLACKBURN, J. There must be judgment for the defendant. I think the decision in *Gresty* v. *Gibson* (1) perfectly right; but I should feel bound by it even if I thought it wrong, for it is directly in point. My own opinion certainly was strongly in favour of the proposition that a person may be made a party to a deed inter partes by description as belonging to the defined class; on the principle that id certum est quod certum reddi potest; and this view is much strengthened by the case of *Maughan* v. *Sharpe* (2), and particularly by the judgment of that very learned judge, Sir E. V. Williams. It is, however, sufficient for the decision of the present case to say I feel bound by the case of *Gresty* v. *Gibson.* (1)

SHEE, J. I also think we are bound by the decision of the Court of Exchequer.

*Judgment for the defendant.*

Attorney for plaintiff: *Stroughill.*
Attorneys for defendant: *Innes & Son.*

(1) Law Rep. 1 Ex. at p. 114. (2) 34 L. J. (C.P.) 19; see p. 24.

UNWIN AND OTHERS, APPELLANTS; CLARKE, RESPONDENT. 1866 *April* 28.

*Master and servant—Absenting from service—Lawful excuse* (4 *Geo.* 4, *c.* 34, *s.* 3) *—Second offence.*

A workman entered into a contract with a master to serve him for the term of two years; he absented himself during the continuance of the contract from his master's service, and under 4 Geo. 4, c. 34, s. 3, he was summoned before justices, convicted, and committed. After the imprisonment had expired, and while the term still continued, he refused to return to his master's service, and was again summoned before justices, when he stated that he considered his contract determined by the commitment; the justices found that he bonâ fide believed that he could not be compelled to return to his employment, and dismissed the summons:—

*Held*, that although the servant had not returned to the service, yet, as the contract continued, he had been guilty of a fresh offence, for which, notwithstanding his conviction and imprisonment, he could be again convicted; and that his bonâ fide belief that he could not be compelled to return to his employment did not constitute a lawful excuse for his absence.

CASE stated by justices of the West Riding of Yorkshire under 20 & 21 Vict. c. 43.

On the 15th of November, 1865, the respondent, who is a cutler at Sheffield, was convicted under the 4 Geo. 4, c. 34, s. 3, on a summons issued by the appellants, for after having entered into the service of the appellants unlawfully absenting himself on the 7th of November from their service without leave or lawful excuse, and without their consent.

On the hearing on the 15th of November, 1865, the appellants proved that the respondent had by a written agreement dated 1st of June, 1865, made between the appellants, who were described as cutlery manufacturers, of the one part, and the respondent, described as a cutler, of the other part, agreed with the appellants to work for them solely for the term of two years from that date, at a schedule of prices named therein; and that he would not hire himself during the term of two years, nor actually agree to serve nor be employed for any other person, save and except the appellants, in any trade whatsoever, nor be employed on his own account nor his own profit; and in consideration of such work being done, the appellants agreed to find the respondent full

1866

UNWIN v. CLARKE.

employment for the term of two years, and to pay him wages for the same at the prices named in the schedule.

The respondent entered into his employment at the date of the agreement, and continued to work for the appellants until the month of November, 1865, when he absented himself, and refused to perform his agreement. The respondent, in answer to the charge, said that he had applied to the appellants to make an advance in his wages in the same manner that the large majority of the cutlery manufacturers in Sheffield had recently done to their hired workmen, which the appellants had refused to do, and in consequence thereof he had felt himself justified in refusing to work for them at the low rate of wages. He declared that he would not return to his work, but would go to prison, and break his agreement.

The justices before whom the summons was heard pointed out to the respondent that the agreement was fixed and certain as to the prices, and could not be altered except by mutual consent, and as the masters declined to raise the prices, he would have to be committed to prison unless he promised to return to his work and perform his agreement.

The respondent still refused, and said he would not return to his work at the prices named, and would sooner go to prison and so break his agreement if the magistrate should so adjudge him.

He was therefore committed to prison for twenty-one days, to be kept to hard labour, and his wages to be abated during that period, which sentence was carried out.

On the 15th of December, 1865, the respondent appeared before the justices in answer to a second summons issued by the appellants, under the same statute, for having on the 7th of December absented himself from the appellants' service without leave or lawful excuse, and without his masters' consent.

At the hearing, the agreement before referred to was again proved, and it was also proved that since the respondent's liberation from prison he had not returned to his work, but had gone to his masters' premises and demanded his working tools (his own private property in possession of his masters), when he was told by one of his masters that he must return to his work and carry out the terms of his agreement. He replied that he should not, as he

considered his agreement broken and at an end by going to prison.

For the respondent, it was contended that although the agreement might still be in existence, it could not be enforced by the justices, and that they had no power to commit the respondent to prison a second time for the same offence. In support of this argument the cases of *Ex parte Baker* (1) and *Youle* v. *Mappin* (2) were cited.

The justices were of opinion that the respondent bonâ fide believed that he could not be compelled to return to his employment after having been sent to prison, and that he did not intend to return after his discharge therefrom. They were also of opinion that the agreement still existed in full force and operation, and that the fact of the respondent going to prison and afterwards refusing to return to his work did not operate to destroy the contract. But that from the cases above cited they considered it doubtful whether they had the power to commit the respondent to prison a second time; they therefore dismissed the information.

The question for the opinion of the Court was, whether the justices had power to commit the respondent to prison a second time.

*Price, Q.C.*, for the appellants. There are two questions, first, whether a servant who has been once convicted under section 3 of 4 Geo. 4, c. 34, for absenting himself from his master's service, if he does not return to the service after his imprisonment, can be again convicted of absenting himself. Secondly, whether, if he does not return under a bonâ fide belief that he is acting legally, even if he be mistaken, he can be punished criminally? With regard to the first question, section 3 enacts, that "if any servant, &c., shall contract with any person to serve him, and shall not enter into his service, according to his contract (such contract being in writing, and signed by the parties), or having entered into such service, shall absent himself from his service before the term of his contract (whether such contract shall be in writing or not) shall be completed, or neglect to fulfil the same, or be guilty

(1) 2 H. & N. 219; 26 L. J. (M.C.) 155.
(2) 30 L. J. (M.C.) 234; 6 H. & N. 753.

1866

UNWIN v. CLARKE.

of any other misconduct or misdemeanour in the execution thereof, then it shall be lawful for any justice of the peace, on proof before him, to commit every such person to the house of correction for a reasonable time, not exceeding three calendar months, and to abate a proportionable part of his wages for and during such period as he shall be so confined, or in lieu thereof, to punish the offender by abating the whole or any part of his wages, or to discharge him from his contract, which discharge shall be given under the hand and seal of the justice gratis." In *Ex parte Baker* (1) this Court decided unanimously that a fresh offence was committed if the servant, having been convicted and suffered his imprisonment, did not return to the service, because the contract continued; and the absenting himself is a distinct offence from the offence for which he had been punished. In *Ex parte Baker* (2), the same point was raised in the Court of Exchequer, and the judges differed. Bramwell and Watson, BB., were of opinion that the conviction did not dissolve the contract, and the prisoner could not be again convicted. Pollock, C.B., thought that the contract was rescinded; and Martin, B., declined to express any opinion on the point; but in the subsequent case of *Youle* v. *Mappin* (3), that learned judge expressed his opinion that the offence was an abandoning of the service, which was a single and entire offence, for which the servant must be punished once for all. The contract, however, is an existing contract; and if the respondent were to absent himself several times, there is no reason why he should not be punished several times.

[MELLOR, J. It would seem, from the power the justices have to abate part of the wages, that the legislature contemplated that the servant should return to the service.]

Yes; besides, the justices had express power to discharge the respondent from the contract; they have not done so, and the contract is therefore not at an end. Here the respondent desires by his wilful absence to get rid of his contract; if he could do so, he would be taking advantage of his own wrong, which he cannot do. The justices ought therefore to have convicted. With regard

(1) 7 E. & B. 697; 26 L. J. (M.C.) 193.
(2) 2 H.& N. 219; 26 L.J.(M.C.) 155.
(3) 30 L. J. (M.C.) 234; 6 H. & N 753.

to the other point, *Rider* v. *Wood* (1) shews, that if the respondent had a "lawful excuse" for his absence, he could not be convicted; here, however, it cannot be said that because he has mistaken the law, he is excused from the penalty he has incurred.

*Quain*, for the respondent. The respondent cannot be convicted again for not returning to the service. It is a continuance of the same absence, for which he has been already punished, and not another and different absenting. It is quite clear that the statute creates a criminal offence amounting to a misdemeanour, and if it had not given a particular remedy before the justices, the servant might have been indicted. He cannot, therefore, be punished from time to time for the same offence. When before the justices on the first occasion, the respondent stated he intended to absent himself permanently, and they had power to punish him for his misconduct, either by sending him to prison, or by discharging him from his contract; they committed him, and it must be presumed that they punished him once for all. If they could punish him toties quoties, instead of sending him to prison for three months, he might be committed from time to time for the whole of the two years he had contracted to serve. The contract may continue for the purpose of bringing a civil action; but it is at an end so far as relates to criminal proceedings; and if the master brought an action for breach of contract, he could only recover damages once for all.

[BLACKBURN, J. Is that so? The contract is a continuing contract, and I think he might from time to time bring his action and recover damages toties quoties. *Hochster* v. *De la Tour* (2); *Withers* v. *Reynolds*. (3)]

The master is entitled to recover prospective damages in one action, and there is no precedent for bringing several actions in such a case.

[BLACKBURN, J. It is different in an action of tort, but where the contract is a continuing one, and the servant returns to the service, and afterwards absents himself, that would be a fresh cause of action, for which damages could be recovered.]

(1) 29 L. J. (M.C.) 1; 2 E. & E. 338.
(2) 2 E. & B. 678; 22 L. J. (Q.B.) 455.
(3) 2 B. & Ad. 882.

1866

UNWIN v. CLARKE.

That is not this case, the respondent would not return to his service; if he had, that would have been evidence of a second contract. In *Youle* v. *Mappin* (1), Martin, B., says: "I think that if a workman leaves his service, intending never to return to it, the master may sue him at law, but if so, he must treat the departure from the service as one entire breach, of which recovery in an action must be deemed a satisfaction. Or, if he prefer it, the master may proceed under the statute, and then the offence is abandoning the service. That is an entire and single offence, which neither the master nor the servant can split into several offences, and when once adjudicated upon, there is an end of it." That is the correct view of the subject, and is not contradicted by any of the authorities. With regard to the other point, the respondent acted bonâ fide, and believed the law to be in his favour, on the authority of *Ex parte Baker* (2) and *Youle* v. *Mappin.* (1)

*Price, Q.C.,* was heard in reply.

BLACKBURN, J. In this case the question turns upon section 3 of 4 Geo. 4, c. 34. I am of opinion that our judgment ought to be for the appellants. The act was passed for the protection of masters, and we are to construe it so as to give effect to the intention of the legislature. Now, section 3 provides that if any servant shall contract with any person to serve him for any time, and having entered into the service, shall absent himself before the term of his contract shall be completed, the justices may commit the servant for a period not exceeding three months, and abate a proportionable part of his wages during the time he is in prison. The facts are, that the masters refused to raise the respondent's wages, and he then absented himself from his work, and declared that he would not return, but would break his contract; for this offence he was convicted and sent to prison for twenty-one days. On his liberation from prison he refused to return to his masters' service, and only went to their place to get his tools. On these facts the question is, was this refusal of the respondent to return to his masters' service, an absenting himself from his ser-

(1) 6 H. & N. at p. 765.
(2) 26 L. J. (M.C.) 155; 2 H. & N. 219.

vice within the meaning of the statute, for which he was liable to be punished, notwithstanding his first conviction? I think it was. The contract is to serve for two years, and the servant stayed away from his work during a portion of the period he was bound to serve; that is certainly an absenting himself from his employment. The contract, however, having been previously broken in November, and the respondent, after his liberation from prison in December, not having come back to his work, the contention on his behalf is, that the first breach of contract put a complete end to the agreement. I think it clear in civil cases that if there be breach of contract, accompanied with an intention of not proceeding further with it, it is at the option of the person with whom the contract is made to elect to rescind; but if there be a contract to serve for one year, and an action be brought during the year for a breach of it, damages may be recovered up to the commencement of the action, and afterwards a second action may be brought for a continuing breach of contract.

It is argued upon the authority of Pollock, C.B., and Martin, B., in *Ex parte Baker* (1), that if a servant absents himself from his master's service, and says at the time that he never means to return, that is an offence to be dealt with once for all; and after he has been convicted once, he cannot be again convicted, because, by the first conviction, the contract is put an end to. But I think there is great force in the argument that it is shewn that the contract is not at an end, by reason of the non-exercise by the justices of the power which they have under the statute to discharge the servant from his contract; and Mr. Quain does not contend that the contract has been put an end to for all purposes. I think it would be hard upon the master when he engages a servant for three years if the servant could, by being once punished for his breach of contract, get rid of it, and so by his wrongful act the master should lose his service for the rest of the time. In *Ex parte Baker* (2) in this court the judges unanimously held that a servant who has been convicted for absenting himself from his master's service, if he refuse to return to the same service, may be again convicted. In *Ex parte Baker* (1) in the Court of Exchequer, Bramwell and

(1) 26 L. J. (M.C.) 155; 2 H. & N. 219.
(2) 7 E. & B. 697; 26 L. J. (M.C.) 193.

1866

UNWIN v. CLARKE.

Watson, BB., agreed with the judges of this court; Pollock, C.B., differed, while Martin, B., doubted; but in the subsequent case of *Youle* v. *Mappin* (1), Martin, B., agreed with Pollock, C.B. I agree with the majority of the judges, and am of opinion that the respondent ought to have been convicted on the second occasion of absenting himself.

On the second point, it was decided in *Turner's* case (2) that although the words "lawful excuse" are not to be found in the statute, yet they are to be implied and incorporated in it, and that the offence created by the statute is "an absenting from service without lawful excuse." This case was followed by *Rider* v. *Wood* (3); there the artificer had a right to determine his contract by notice, and he gave a notice which he bonâ fide believed to be a sufficient notice, but it turned out that it was invalid; he thought he had given a good notice when he had not, the man therefore in that case absented himself under a mistake of fact that he had a right to do so, and it was held that a man who acted under a mistake of fact could not be said to have absented himself without lawful excuse, inasmuch as there was no wilful intention to break his contract. But the present case is different. Here there is no mistake of fact. The respondent thought that he could legally absent himself; he was therefore mistaken as to the law, and he cannot set up as a defence that he has mistaken the law.

MELLOR, J. I am of the same opinion. The act was passed to afford a protection to masters. I think Mr. Quain is wrong in his contention that only one offence under a contract is punishable under the statute. His contention is, not that the contract is at an end, but that after the servant has been once punished the master is no longer under the protection of the statute; but this is not so. After the first offence has been purged by a commitment, if the servant commit a fresh offence he can be punished for it. It was not the intention of the legislature that a commitment under the statute should put an end to the contract, and this is shewn by the latter part of section 3, by which the justices have a distinct power to discharge the servant from the contract. It

(1) 30 L. J. (M.C.) 234; 6 H. & N. 753.
(2) 9 Q. B. 80.
(3) 29 L.M.) 1; 2 E. & J. C. E. 338.

may be that this is a hard case, but at the same time we must give effect to the intention of the legislature, and on the construction of the words they have used we must give our judgment for the appellants.

On the other point I also agree with my Brother Blackburn. *Turner's* case (1), and *Rider* v. *Wood* (2), shew that a man acting under a mistake of fact may have a "lawful excuse" for an absence from service; but that principle cannot apply to the present case; it would be very dangerous to hold that ignorance of the law will excuse a man.

SHEE, J. I certainly should not have come to the conclusion at which my Brothers have arrived, but for the authorities. In my opinion the respondent could not properly have been convicted. The statute provides for two offences, first, a breach of contract by not entering into the service contracted for; secondly, by a servant's absenting himself from the service after he has entered into it; the offender in either of these ways being described as "the person who shall not have fulfilled his contract." In the first case the contract must be in writing: in the second it need not be so. Now it appears to me to be clear that for the offence of not entering into the service, the offender can only be punished once—"Such justice," in the words of the statute (section 3), being empowered "to commit such person to the House of Correction, there to remain and be held to hard labour for a reasonable time, not exceeding three months." It is under these same words that a servant who, having entered upon the service, absents himself from it, is punishable. I think that on the proper construction of them, a servant who absents himself from his service, declaring at the time that he will not return, commits an offence of the same degree as that of declining altogether to enter into the service, and that it cannot have been the intention of the legislature that he should be punishable only once for the latter offence, and toties quoties, by successive imprisonments, for the former. The justices ought in such a case to take into their consideration that the person charged has declined absolutely to return to the service, and punish him once for all. It has been said that it is unreasonable that a second

(1) 9 Q. B. 80. (2) 29 L. J. (M.C.) 1; 2 E. & E. 338.

1863

UNWIN v. CLARKE.

absenting from the service should not be punished as well as the first, but in my opinion the meaning of a man absenting himself is, that being in the service he departs from it. If he had returned to the service and then left it again, he might have been punished again, but having originally declared he would never come back, I think his non-return was not a fresh absence, and that he was not punishable a second time. The weight of authority is against this view, but I agree with Pollock, C.B., and Martin, B., in *Ex parte Baker.* (1)

On the other point, the case expressly finds that the respondent absented himself under the bonâ fide belief that his imprisonment had determined his contract. The conduct which is punishable by this section is conduct of which the servant must be "guilty." I see no substantial difference between this case and *Wood* v. *Rider.* (2) In that case, Cockburn, C.J., said two things must concur before a conviction could take place under this statute; first, a wrongful absence, and secondly, a knowledge that it was wrongful. Here the respondent acted bonâ fide, believing that as the law stood he could not be convicted again. In *Reg.* v. *Langford & Others* (3) several persons were indicted on the 7 & 8 Geo. 4, c. 30, for the *felony* of riotously demolishing a house. Patteson, J., ruled, that if they really believed the house to be the property of one of them, and acted under a bonâ fide assertion of a supposed right, they could not be convicted. A man ought not to be convicted of a purely statutable misdemeanour unless he has the *mens rea;* here the respondent really believed he was justified in not returning, and acted bonâ fide, and therefore ought not to have been convicted. As my Brothers are of a different opinion, and the weight of authority is in favour of the appellants, I do not wish formally to differ from the judgment of the Court.

*Judgment for the appellants without costs.*

Attorney for appellants: *Fiddey.*
Attorney for respondent: *Pitman.*

(1) 26 L. J. (M.C.) 155; 2 H. & N. 219.
(2) 29 L. J. (M.C.) 1; 2 E. & E. 338.
(3) Car. & M. 602.

## BALMFORTH *v.* PLEDGE.

1866
*May* 4.

*Practice—New trial in cause tried in County Court under* 19 & 20 *Vict. c.* 108, *s.* 26.

Where a cause brought in a superior court is tried in a county court pursuant to a judge's order, under the 19 & 20 Vict. c. 108, s. 26, the jurisdiction to grant a new trial remains in the superior court.

ISSUES having been joined in this cause, it was tried in the County Court of Yorkshire, holden at Bradford, pursuant to a judge's order under the 19 & 20 Vict., c. 108 s. 26 (1), and a verdict found for the plaintiff.

*C. R. Kennedy* having obtained a rule nisi for a new trial,

*Kemplay* shewed cause. There is a preliminary question as to the jurisdiction of this court to grant a new trial. The application should have been made to the county court judge, who has power under section 89 of the 9 & 10 Vict. c. 95, to grant a new trial. Under section 26 of the 19 & 20 Vict. c. 108 (1), the cause and not merely the issues, is sent to the county court. No doubt in *Angel* v. *Ihler* (2), where a cause was tried before the sheriff, pursuant to a writ of trial under the 3 & 4 Wm. 4, c. 42, s. 18, it was held that it was competent to the court to set aside the verdict and grant a new trial, notwithstanding the sheriff had refused to stay proceedings; but Parke, B. relied on section 19, which expressly applies all the provisions of the 1 Wm. 4, c. 7, to writs of trial.

(1) 19 & 20 Vict. c. 108, s. 26. "Where in any action on contract brought in a superior court the claim indorsed on the writ does not exceed 50*l*, or where such claim, though it originally exceeded 50*l*., is reduced, by payment into court, payment, an admitted set off, or otherwise, to a sum not exceeding 50*l*, a judge of a superior court, on the application of either party, after issue joined, may, in his discretion, and on such terms as he shall think fit, order that the cause be tried in any county court which he shall name; and thereupon the plaintiff shall lodge with the registrar of such court such order and the issue, and the judge of such court shall appoint a day for the hearing of the cause, notice whereof shall be sent by post or otherwise by the registrar to both parties or their attorneys; and after such hearing the registrar shall certify the result to the master's office of such superior court, and judgment in accordance with such certificate may be signed in such superior court."

(2) 5 M. & W. 600.

1866

BALMFORTH v. PLEDGE.

In *Owens* v. *Breese* (1) the Court of Exchequer Chamber decided that a writ of trial under the 3 & 4 Wm. 4, c. 42, would not go to a judge of a county court, because he would have to try the cause according to the course at common law, and not according to the practice of his own court. Under that act the writ would have gone to the judge of the court, not to the court; but here the cause is sent to the court, and the cause must be tried not according to the practice of the superior court in which it was commenced, but according to the practice of the county court in which it was; so that the cause has been in effect transferred to the county court, with all the incidents attending such transfer.

[SHEE, J. The judgment is to be signed in the superior court.

BLACKBURN, J. The cause is only sent for trial not removed into the county court.]

It would be very anomalous for a cause to be tried according to the practice of one court, and yet a new trial to be moved in another court with different practice. There has been no case under this section except *Wheatcroft* v. *Foster* (2) which decided that where a cause is sent for trial in a county court the costs as to the trial ought to be on the county court scale.

[BLACKBURN, J. Under the old practice where a cause was sent to be tried in one of the Counties Palatine it was sent by mittimus to the chancellor or justices to be tried by the justices, but a new trial was always moved for in the superior court, and not in the court of the County Palatine.]

In that case the cause was sent to be tried by the justice of the County Palatine, simply as the judicial officer to try, by the same course as if the cause had been tried in the superior court.

*C. R. Kennedy* was called upon to support his rule on this point. Section 26 simply empowers a judge to order that the cause be tried in a county court, the county court judge is to fix a day for the hearing, and the registrar after such hearing is to certify the result. As soon as the cause has been tried therefore the registrar is to certify the result, and there would be no opportunity for applying to the county court for a new trial unless it were made immediately, but by the rules of the county court

(1) 6 Ex. 916. (2) 27 L. J. (Q.B.) 277; E. B. & E. 737.

the application need not be made till the first court held after twelve days from the hearing.

[LUSH, J. If the new trial is not to be applied for in the superior courts, the parties in a case not exceeding 20*l.* would be deprived of all resort to the superior court, as there is no appeal under the county court acts in such a case.]

It may also be very questionable how far section 89 of the 9 & 10 Vict. c. 95, giving power to a county court judge to grant a new trial, can apply to such a case as the present, the original act having reference only to causes commenced in the county court.

BLACKBURN, J. This question is of some practical importance —whether when a cause commenced in a superior court is tried in a county court, under a judge's order, pursuant to section 26 of the 19 & 20 Vict. c. 108, the application for a new trial ought to be made to the superior court or to the county court. I think the jurisdiction is in the superior court; and the ground of my opinion is this:—First, the section says that after issue joined, when there is nothing more in the cause but the trial to take place, a judge may order the cause to be tried in a county court. He is not to transfer the cause to the county court, but send it for trial only. Now, when a cause in one of the superior courts is sent to be tried, whether by the under sheriff or by a judge at nisi prius as an ordinary commissioner of assize on circuit, or in one of the counties Palatine, as a general incident there is the superintending power in the Court to set aside the verdict and to grant a new trial. Is there anything in the present enactment to take away that general incident when the cause is sent to be tried by a county court judge? There are certainly no express words to that effect. Upon the order being made, the order and issue are to be lodged with the registrar, and after the hearing the registrar is to certify the result, and judgment in accordance with his certificate may be signed in the superior court. When the trial of the cause has taken place, the power of the county court is over, and the registrar has simply to certify the result of the trial. It is true that the county court must proceed by its own rules on the trial; and if the case is tried by the judge alone without a jury, there may be practical difficulties as to moving for

1866

BALMFORTH v. PLEDGE.

a new trial, but these difficulties are not sufficient to induce me to say that the jurisdiction of the superior court to grant a new trial is taken away. Had it been intended that the cause itself should be removed into the county court, the legislature might have said so, as in the case of removing the cause from the inferior to the superior court; but under the present enactment the trial only is to take place in the county court, the cause itself remaining in the superior court. I am therefore clearly of opinion that the motion was rightly made in this court.

MELLOR, J. My opinion is not so clearly formed on the matter as that of my learned Brothers, though I do not wish to dissent from their judgment. It appears to me that the policy of the legislature in giving power to a judge of a superior court to direct that a cause commenced in a superior court should be tried in the county court, was to give power to the county court judge to deal with such causes as the judge of the superior court should consider might be dealt with more conveniently in the inferior court. One difficulty which suggests itself to my mind is that the cause is tried in the county court, not as it would be in the superior court by the course at common law, but according to the practice of the county court. Then, on the other hand, it is said the power of the county court judge to grant a new trial under section 89 of the 9 & 10 Vict. c. 95, is confined to causes commenced in the county court. No doubt that may be a difficulty, if the section is to be so confined. Another difficulty suggested is that, by section 26 of the 19 & 20 Vict. c. 108, the registrar is "to certify the result," and it is said that can only be the result of the original hearing; but why may it not be the result of the cause up to judgment? And there is good reason why the judgment should be signed in the superior court for the purposes of execution. I am only expressing my doubts, which I confess are not entirely removed; but the practical difficulties are not great, and therefore I am perfectly content to abide by the decision of the other members of the Court, and to hold that the superior court has jurisdiction to grant a new trial.

SHEE, J. I agree with my Brother Blackburn. The 9 & 10 Vict. c. 95, relates entirely to suits brought in the county courts under that act, and commenced according to section 59 by

plaint; and section 89, giving the judge of the county court power to order a new trial, can apply to such causes only. The 19 & 20 Vict. c. 108, s. 26, provides that a judge of the superior court may order that a cause shall be tried in a county court—that is, if the cause involves a small amount, and the judge thinks it proper that it should be tried by that cheap and expeditious mode—and the judge of the county court is to appoint a day for the hearing of the cause, and after such hearing the registrar is to certify the result, and judgment in accordance with his certificate may be signed in the superior court. Now, if the construction which Mr. Kemplay contends for were to prevail, these last provisions would be inconsistent with the scheme of the act, inasmuch as under section 49 the cause having become a county court cause the judgment in it would, but only if the amount recovered exceeded 20*l.*, be removable by certiorari into a superior court that execution might be had thereon. The true construction is that it is obligatory on the registrar to certify the result, because the cause still remains in the superior court, and judgment is therefore to be signed in that court. Again, had it been intended, as respects a cause sent from a superior court for trial, to incorporate into section 26 all the provisions of section 89 of the original act, instead of saying "after such *hearing*," simply, there would have been added, or if the judge should think fit to grant a new trial, after the hearing of the cause on such new trial. I am therefore of opinion that this court, and not the county court, has jurisdiction to grant a new trial.

LUSH, J. I am of the same opinion. Under section 26 the jurisdiction of the superior court over the cause is not taken away by reason of it being sent for trial to the county court. If the contrary had been intended, we should have found words indicative of that intention, or, at all events, words that should admit of such a construction. But section 26 only says that the cause is to be sent for trial to the county court. The judge of the county court is only to try the cause, and when he has done that he is functus officio, and the registrar is to certify the result. The judge of the county court is precisely in the same position as the under-sheriff, or as a judge when acting as a commissioner of assize; they try the cause, but beyond the trial all jurisdiction as to new trials,

1866

BALMFORTH v. PLEDGE.

&c., remains vested in that court out of which the writ issued. Under section 26, the county court judge is simply substituted for the under-sheriff or commissioner of assize; and therefore the general jurisdiction over the cause remains exactly as it was before the section passed.

Counsel having been heard on the merits, the rule for a new trial was made absolute.

*Rule absolute.*

Attorney for plaintiff: *H. B. Clarke.*

Attorneys for defendant: *Pattison & Wigg.*

## THE QUEEN *v.* LOFTHOUSE AND WILSON.

1866
*May 4.*

*Quo warranto—Disqualification of relator—Local board of health, election of—Validity of voting papers left in blank—Duty of chairman*—11 & 12 *Vict. c.* 63, *s.* 24.

By the 11 & 12 Vict. c. 63, s. 24, at the election of a local board of health, if the candidates nominated are more than the vacancies, "the chairman shall cause voting papers, in the form in schedule A, to be prepared and filled up, and shall insert therein the names of all the candidates; and shall three days before the election cause one of such voting papers to be left at the address or residence of each owner, proxy, and ratepayer." The form in the schedule has columns for the name and address of the voter, and the number of votes, as owner, as ratepayer.

Previous to an election voting papers were delivered, duly filled up, except that the column for the number of votes was left in blank. After the election a rule for a quo warranto was obtained by M., one of the unsuccessful candidates, against two of the persons declared elected, on the ground that the voting papers having been left in blank the election was void. M. had himself voted with a voting paper left in blank, and had also taken part at former elections, when a similar course had been pursued, and had been himself so elected:—

*Held*, that M. was disqualified from becoming relator.

*Held*, also (by Blackburn and Mellor, JJ.; Shee, J., dissenting) that, although it was the chairman's duty to fill up the voting papers with the number of votes, the omission did not vitiate them and render the election void.

THIS was a rule obtained on behalf of Edward Maw, calling upon the defendants to shew cause why an information in the nature of a quo warranto should not issue to shew by what authority they claimed to exercise the office of members of the local board of the non-corporate district of Cottingham, in the East Riding of Yorkshire, on the ground that the voting papers used at their election had not been filled up with the number of votes the voters were entitled to, as required by section 24 of the Public Health Act, 1848, 11 & 12 Vict. c. 63.

The 11 & 12 Vict. c. 63, s. 24, enacts that . . . If the number of candidates nominated for the office of a member of a local board exceed the number to be elected, "the chairman shall cause voting papers in the form contained in the schedule (A) to this act annexed, to be prepared and filled up, and shall insert therein the names of all the persons nominated, in the order in which the nomination papers

1866

THE QUEEN v. LOFTHOUSE.

were received, but it shall not be necessary to insert more than once the name of any person nominated; and the chairman shall, three days before the day of election, cause one of such voting papers to be delivered by the persons appointed for that purpose to the address in the parts for which the election is to be held of each owner and proxy, and at the residence of each ratepayer entitled to vote therein."

The form given in schedule A contains columns, for the number of voting paper; name and address of voter; number of votes, as owner, as ratepayer. (1)

(1) The following sections are also material to the arguments and judgments:—11 & 12 Vict. c. 63, s. 25. "Each voter shall write his initials in the voting paper delivered to him against the name or names of the person or persons (not exceeding the number of persons to be elected) for whom he intends to vote, and shall sign such voting paper; and when any person votes as a proxy he shall in like manner write his own initials, and sign his own name, and state also in writing the name of the corporation, company, or body of proprietors or undertakers for which he is proxy."

S. 26. "The chairman shall cause the voting papers to be collected on the day of election by the persons appointed or employed for the purpose, in such manner as he shall direct; but no voting paper shall be received or admitted unless the same have been delivered at the address or residence as aforesaid of the voter within the parts for which the election is had, nor unless the same be collected by the persons appointed or employed for that purpose, except as next hereinafter provided: Provided always, that if any person qualified to vote shall not have received a voting paper as aforesaid, he shall, on application before that day to the chairman, be entitled to receive a voting paper from him, and to fill up the same in his presence, and then and there to deliver the same to him: Provided also, that, in case any voting paper duly delivered shall not have been collected, through the default of the chairman, or the persons appointed or employed to receive the same, the voter in person may deliver the same to the chairman before twelve o'clock at noon on the day, or the first day (as the case may be), appointed for the examination and casting up of the votes."

S. 27. "The chairman shall, on the day immediately following the day of the election, and on as many days immediately succeeding as may be necessary, attend at the office of the local board of health and ascertain the validity of the votes by an examination of the rate books, and such other books and documents as he may think necessary, and by examining such persons as he may see fit; and he shall cast up such of the votes as he shall find to be valid, and to have been duly given, collected, or received, and ascertain the number of such votes for each candidate; and the candidates to the number to be elected, who, being duly qualified, shall have obtained the greatest number of votes, shall be deemed to be elected, and shall be certified as such by the chairman under his hand; and to each person so elected the chairman shall send or deliver notice of such election; and the chairman shall also cause to be made a list containing the names of the candi-

It appeared from the affidavits on which the rule was obtained, that the election for members of the board of the Cottingham district took place in November, 1865, there being three vacancies in the board, and eleven candidates. The defendants and another candidate were the first three on the poll, and the relator Maw fourth. Voting papers were delivered to the voters as required by the 24th section, but they were not filled up with the number of votes to which each voter was entitled, whether as owner or ratepayer, and the number of votes were not inserted in the voting papers either before or after the election.

In the affidavits filed, on shewing cause, it was stated that the board was established in 1863, Mr. Whitty, the present chairman, was the first chairman, and had held the office ever since. He omitted to fill in the number of votes, after consultation with his legal adviser, on the ground that it was unnecessary, as by section 27, he would have after the election to examine into the validity of each vote before declaring the election. After the election he did so examine, and published a list of the number of votes given to each candidate, as required by section 27; and, in addition to this, he caused a list to be printed and published of the number of votes he had allowed to each voter, with the names of the candidates for whom each had voted.

Paragraph 10 of the affidavit made by the chairman was as follows: "The relator held office as a member of the board from its formation to November, 1865, and was elected in a similar manner to that pursued at this election, and sought re-election, and took an active part in canvassing, and himself voted with a voting paper which had not been filled up with the number of votes prior to delivery, without having ever given notice or raised the question

dates, together with (in case of a contest) the number of votes given for each, and the names of the persons elected, and shall sign and certify the same, and shall deliver such list, together with the nomination and voting paper (*sic*) which he shall have received, to the local board of health at their first or next meeting, as the case may be, who shall cause the same to be deposited in their office, and the same shall, during office hours thereat, be kept open to public inspection, together with all other documents relating to the election, for six months after the election shall have taken place, without fee or reward; and the chairman shall cause such list to be printed, and copies thereof to be affixed at the usual places for affixing notices of parochial business within the parts for which the election shall have been made."

1866

THE QUEEN v. LOFTHOUSE.

of the validity of the voting papers until after he was defeated."

*T. P. E. Thompson* shewed cause on behalf of the defendant Lofthouse. Section 13 of the Public Health Act, 1848, 11 & 12 Vict. c. 63, points out the mode in which a local board of health for a non-corporate district is to be formed, and the electors are, by section 20, to be the ratepayers and owners of property in the district in proportion to the rateable value of the property. Section 23 prescribes the form of notice of election; and then section 24, on which the present question turns, enacts that if the number of candidates nominated exceed the number of vacancies, "the chairman shall cause voting papers, in the form contained in Schedule A, to be prepared and filled up, and shall insert therein the names of all the persons nominated; . . . . and the chairman shall, three days before the day of election, cause one of such voting papers to be delivered at the address of each owner and proxy, and at the residence of each ratepayer." In the form given in the schedule there are columns for the number of votes the voter is entitled to as owner or ratepayer, or both; and the ground of the present rule is that these columns were left in blank, and it is said that this omission vitiates the voting papers, and so makes the election void; but this is a fallacy. It may be doubtful whether it is required to fill up the number of votes at all, but at most this can only be directory; the number of votes inserted is not in the least conclusive as to how many the voter is really entitled to; that is to be ascertained by the chairman *after* the election, as directed by section 27. As long as the voting paper contains the voter's name and the names of all the candidates, that is all that is absolutely necessary; whatever number of votes the elector is entitled to he must give the whole of them to such of the candidates, not exceeding the number to be elected, as he chooses, by putting his initials to the names of those candidates for whom he intends to vote, as pointed out by section 25 and the schedule. There is, however, a preliminary objection to this rule on the ground that Mr. Maw is not competent as a relator, he has on former occasions, and also at the present election, acquiesced and participated in the course pursued as to the voting papers, as

appears from paragraph 10 of the chairman's affidavit; this incapacitates him from being relator: *Rex* v. *Trevenen.* (1)

*Philbrick* and *Atkinson* appeared for the defendant Wilson; but the Court called upon

*Forbes,* in support of the rule. The enactments of section 24 are not merely directory but imperative. In the first place there is good reason why the number of votes should be filled in, in order that the voter may know how many votes he is allowed.

[BLACKBURN, J. Suppose the chairman had made a mistake, the voting paper will not shew how many votes the voter will be allowed, so that the filling up does not afford this information.]

But if there be a mistake, the voter would have an opportunity of calling the returning officer's attention to it.

[BLACKBURN, J. That is so: and is a reason why the number ought to be inserted; but it does not shew that the insertion is a condition precedent to the validity of the voting paper.

MELLOR, J. Suppose six votes inserted when the voter is only entitled to three, or two when he is entitled to three. If the mistake does not vitiate the voting paper, how can the filling up be absolutely necessary? I cannot see the difference between none and a wrong number.

SHEE, J. The relator's objection must amount to this, that there were no voting papers at all.]

The objection, no doubt, amounts to that. The chairman, by section 27, is to ascertain the validity of the votes, and cast up such of the votes as he shall find to be valid, and to have been duly given, collected, or received. In the present instance there were no votes duly given. If the columns are left in blank, neither the voter nor any one else but the returning officer can ever ascertain how many votes have been allowed each elector.

[BLACKBURN, J. There is no provision in section 27 for shewing at all how many votes have been ultimately allowed upon the scrutiny by the chairman. A list of the aggregate number of votes given for each candidate is all that is required to be published.]

All the voting papers received are to be handed by the chairman to the local board, and kept at their office, open for public inspection, for six months after the election.

(1) 2 B. & A. 339.

1866

THE QUEEN v. LOFTHOUSE.

[SHEE, J. There is a provision in section 26 for filling up a voting paper by the voter in the presence of the chairman before the day of election if no voting paper has been duly delivered; which shews that the paper ought to be filled up before it is used. That seems to be the course the voters ought to have pursued in the present case, treating the papers delivered as no voting papers.]

As to the objection to the relator, *Rex* v. *Benney* (1) is a direct authority that a relator is not disqualified by the mere circumstance of having formerly taken part in other elections, where the same irregularity existed but was not noticed. So in *Rex* v. *Parkyn* (2), the relator was held disqualified, but it was on the ground that objection to the irregularity had been taken and overruled on the former occasion, and the relator then voted knowing of the irregularity.

[BLACKBURN, J. The cases on this point are collected in Corner's Crown Practice, pp. 184-5; and it is laid down that "the relator is disqualified by having acquiesced or concurred in the act of which he comes to complain, or in similar acts at former elections."]

It is true that in a certain sense the relator here concurred or acquiesced, but he had no knowledge of the omission being a fatal irregularity. It is said in Corner, p. 185, that a man is not disqualified as relator if he had no means of knowledge.

[*Thompson* called the attention of the Court to *Rex* v. *Slythe* (3), in which the Court held that it lay on the person seeking to become relator, if he has concurred in the objectionable act, to shew he was not cognisant of the objection.]

BLACKBURN, J. I am of opinion that this rule ought to be discharged upon both points. Section 24 of the Public Health Act requires that the chairman shall cause voting papers, in the form contained in schedule A, to be prepared and filled up, and shall, three days before the election, cause one of such voting papers to be delivered at the address of each of the voters, who are by means of these papers to vote for the candidates nominated. The form given in schedule A contains columns for the number of

(1) 1 B. & Ad. 684. (2) 1 B. & Ad. 690.
(3) 6 B. & C. at p. 243.

16 BD 34 342.

votes as owner, as ratepayer; and there can be no doubt, I think, taking section 24 and the schedule together, that the chairman ought to fill up the blank columns with the number of votes to which he considers the voter entitled, so as to give notice to the voter what number he has been allowed. Instead of doing so in the present case, the chairman left these columns blank. I think, therefore, he neglected his duty as returning officer, and would be liable to the penalty imposed by section 28, for neglecting to comply with the provisions of the act; and if it were shewn that he had acted wilfully, the penalty would be enforced to the full extent. But the question is, whether the fact of the columns being left in blank vitiates the voting papers and renders the election void; that depends upon whether the insertion of the number of votes is a condition precedent to the validity of a voting paper, or in other words, whether the requirement of the statute on this head is obligatory. I think the omission does not vitiate the voting paper. The insertion of the number of votes previously to the election appears to be required in order that when the chairman comes to investigate the validity of the votes under section 27, an opportunity may be afforded to the voter to suggest to the chairman, if a wrong number has been inserted, the true number the voter is entitled to. But although the voter thus has it in his power to find out and have the mistake rectified, the insertion gives no notice to the opposite party if too many votes have been inserted. Under section 27, the chairman, after the day of election, is to examine into and finally decide on the validity of the votes, and to cast up such of the votes as he shall find valid, so that it seems plain that the number inserted before the election is by no means conclusive. If too many votes have been inserted it is the chairman's duty to disallow the excess; or if too small a number, and the chairman's attention is called to the fact, it is his duty to allow the proper number; and why he should not also do this if the voting paper, instead of having too few votes inserted, is left in blank, I am at a loss to suggest a reason, and Mr. Forbes has not been able to shew any. Where anything is absolutely essential from its nature to be inserted in the voting papers, as the names of all the candidates, then the omission would render the voting paper a nullity; but when we

1866

THE QUEEN v. LOFTHOUSE.

find that the mere non-filling up of the columns for the number of votes has not that effect, then the omission to fill the blanks at all cannot on any reasonable ground vitiate the voting papers any more than a mistake in the number. It is said that without the insertion of the number of votes there is no means of ascertaining the number of votes allowed; but if the papers are filled up, inasmuch as the number inserted is not conclusive, the voting papers would not shew that; nor in fact is this ever necessarily shewn. Under section 27 the chairman is to make out and certify a list of the candidates and the number of votes given for each; but the section does not require that the names of the voters and the number of votes allowed should be published, though this was done in the present instance, and is a very proper course to pursue, though not absolutely necessary or required by the statute. I am therefore clearly of opinion that the failure of the chairman to fill up the columns with the number of votes did not vitiate the election, and the rule should therefore be discharged as failing on this ground.

But there is another ground why we ought not to make the rule absolute, and that is, that in the exercise of our discretion to grant this prerogative writ we ought not to grant it to Mr. Maw, under the circumstances shewn by the affidavits. We must see that the relator is a fit person to be intrusted with this prerogative process of the Crown. In the present case it appears from the affidavits that the present chairman has been chairman from the first constitution of the board, and has been returning officer on previous occasions; and he says that he issued the voting papers in a similar way; that Mr. Maw has also been a member of the board from its formation, and has taken part in the previous elections, which were conducted in a similar manner, and also himself used the voting papers in which the number of votes was not filled up before delivery; nevertheless he kept his objection back until after he was defeated on the present occasion. That is a matter that disentitles Mr. Maw to become a relator; it is very much like the case where an arbitrator has done something wrong, but both parties, although knowing of it, nevertheless proceed, and neither can afterwards take advantage of the objection. The rule must be discharged with costs.

1866

THE QUEEN v. LOFTHOUSE.

MELLOR, J. I am of the same opinion. The last ground is conclusive against the relator. The circumstances stated in the affidavits bring him precisely within the rule which is very correctly stated in Corner's Crown Practice p. 184, "The relator must not be disqualified by having acquiesced or concurred in the act which he comes to complain of, or in similar acts at former elections."

1 Q B D. 34

But as the other ground is a point of importance I wish to state my reasons for agreeing with my Brother Blackburn. The vice of Mr. Forbes' argument is, that he did not distinguish sufficiently between the functions of the chairman; some of which are judicial no doubt, but there are others which are merely ministerial. Now by section 24, the chairman shall cause voting papers in the form given in schedule A to be filled up and delivered, and shall insert therein the names of all the persons nominated. In the form given in schedule A there are two columns for the number of votes the voter is entitled to as owner or ratepayer, and as the paper is to be filled up the number ought to be stated, and therefore by leaving these columns blank the returning officer has not done what he ought, and he no doubt is liable for the neglect; but the voter can use the paper as well without as with the number of votes inserted. On the other hand section 24 enacts that the chairman shall insert all the names of the persons nominated, and that that is absolutely necessary appears from section 25 and the schedule; for the voter is to put his initials on the voting paper opposite the names of the candidates he votes for, and he cannot do this if the names are omitted. Then follows section 26, which enacts that no voting paper is to be received which has not been delivered to the voter; provided that a voter, who has not received a paper, may apply to the chairman and is entitled to receive from him a voting paper and to fill it up in his presence. In section 27 the functions of the chairman are judicial: he is to examine into the validity of the votes, and cast up such of the votes as he shall find to be valid. Mr. Forbes would read this "such of the votes named in the voting paper"; but the chairman cannot do this simply from the votes in the paper, for then he could neither add to nor take from the number inserted in the first instance; whereas he is to ascertain the validity of the votes, which must include of

1866

THE QUEEN v. LOFTHOUSE.

course the number each voter is entitled to, and that he is to do from the rate books and other documents and by the examination of witnesses if necessary. The chairman is then to publish a list of the number of votes each candidate has received. Section 28 imposes penalties for neglect of duty. But I cannot see how the chairman's present neglect of duty can affect the validity of the election; the number of votes each candidate will have received does not depend on the number the chairman may have caused to be inserted in the voting paper in the first instance, but on the number he ultimately allows on his examination after the election and before the declaration. No doubt the insertion beforehand of the number of votes to which primâ facie the voter is entitled, affords facilities for arriving ultimately at a correct conclusion, and therefore it is very right and proper to say the chairman shall send out the voting papers filled up with the number of votes; but it would be a very strong thing to say, because he has not done that which is in no way essential to the performance of his judicial functions in ascertaining and declaring what candidates have received the greatest number of valid votes, that that omision shall vitiate the election.

SHEE, J. I regret to say I differ from my Brothers Blackburn and Mellor on the main point, and I shall proceed to state the grounds of my opinion. It is admitted by Mr. Thompson and my learned Brothers that the chairman has not conducted the election strictly according to the mode pointed out by the statute. He has failed, as it seems to me, in an important particular, and has failed to do that which is essential to give validity to the voting papers. By section 20 it is enacted that electors shall have a number of votes in proportion to the rateable value of their property, both as owners and ratepayers; and the votes are to be "given, taken, collected, and returned according to the directions hereinafter contained." This is very important to bear in mind when considering the effect of section 24 and the form of the voting papers. No one can doubt, if this election had been conducted without any voting papers, although no single voter had been allowed more votes than he was entitled to, that the election would have been void. By section 24 the voting paper is to be in the form given in schedule A, and is to be prepared and filled up

by the chairman, or at least under his direction. The form contains columns for the number of the voting paper, the name and residence of the voter, the number of votes, and also another set of columns for the name, residence, and calling of the persons nominated, and of the nominators. Now surely the meaning of the section and schedule taken together is that all these particulars, for which there are blank columns, should be filled in. It is remarkable, however, that there is no direction in the section as to the insertion of any one particular except as to the names of the persons nominated. But surely the chairman, or some one under his direction, must fill up the other particulars; if this were not done, the section and schedule would be nugatory. And what is the object of requiring the chairman to do this? Why, that a person who is entitled to a certain number of votes may know whether the right number has been allotted to him by the chairman, and that he may have an opportunity of pointing out any mistake. By section 26, again, the duty attaches of collecting the voting papers which have been delivered, and in case of the omission to supply any voter with a paper, there is another provision by which the voter who has not received a voting paper is entitled to receive one from the chairman and fill it up in his presence. Surely this shews that before the election, be it ever so late, the voter may insist on a voting paper being duly filled up, or do it himself in the presence of the returning officer. Then we come to section 27, which points out the duties of the chairman after the day of election. He is to ascertain the validity of the votes by examining the rate books, &c., and cast up such of the votes as he shall find to be valid, and to have been duly given, collected, or received; the object being that, in case of dispute as to the number he has originally allotted to each voter, the true number the voter is entitled to may be ascertained. And the chairman is then to cause a list to be published shewing how many votes each candidate has received. That list, however, need not shew how many votes have been allowed to each voter, so that if the voting papers are left in blank, not even an approximate conjecture can be formed as to how many votes have been allowed to each. On the first point, therefore, I differ from the other members of the Court, though with the diffidence I always feel when differing from my learned

1866

THE QUEEN v. LOFTHOUSE.

Brothers; and I think there were in effect no voting papers, and consequently the election was void.

On the other point, I agree that we ought not to assist this relator. Cases have been brought to our notice which shew that where a man with the knowledge of the irregularity of a particular course, nevertheless concurs in it, he cannot afterwards take advantage of the irregularity. In the present case Mr. Maw voted on a voting paper which he knew or believed to be irregular. He therefore comes precisely within the rule enunciated by Lord Kenyon, C.J. in *Rex* v. *Clarke* (1):—"The Court have on several occasions said, and said wisely, that they would not listen even to a corporator who has acquiesced or perhaps concurred in the very act which he afterwards comes to complain of when it suits his purpose; and so far I think we have determined rightly." And there are other cases to the same effect. The present relator has concurred in the very act he now complains of, for he has used voting papers in blank in this very election and in others. Therefore, in the exercise of our discretion, we ought not to assist him.

*Rule discharged with costs.*

Attorneys for relator: *Bell, Brodrick, & Lambert.*
Attorney for defendant Lofthouse: *Newstead.*
Attorneys for defendant Wilson: *Cunliffe & Beaumont.*

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*Explained.* WILLEY v. PEACE [1951] 1 K. B. 94

*April* 25.

HADLEY AND OTHERS, APPELLANTS; PERKS AND ANOTHER, RESPONDENTS.

*Metropolitan Police Acts*, 2 & 3 *Vict.* c. 47, *s.* 66; 2 & 3 *Vict.* c. 71, *s.* 24—"*Having or conveying*" *property suspected of being stolen—Offender* "*brought before a magistrate*"—*Practice—R. G. Hil. T.* 1862—*Division of Appendix to special case into paragraphs.*

Section 24 of 2 & 3 Vict. c. 71,—which enacts that every person who shall be brought before a metropolitan magistrate charged with having in his possession or conveying in any manner anything which may be reasonably suspected of being stolen or unlawfully obtained, and who shall not give an account to the satisfaction of the magistrate of how he came by the same, shall be guilty of a

(1) 1 East. at pp. 46-47.

misdemeanour,—is supplemental only to section 66 of 2 & 3 Vict. c. 47, which empowers a constable to stop, search, and detain any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully detained; and the sections apply only to possession in the streets, and not to possession in a house.

*Semble*, that in a case, in which a constable would have been authorized to arrest, the magistrate would have jurisdiction, although the offender had not been arrested, but was "brought before" him by summons.

Evidence and documents, set out at length in an appendix to a special case, should be numbered in paragraphs, pursuant to R. G. Hil. T. 1862, or the costs will not be allowed.

CASE stated by the Lord Mayor of London, as one of the justices for that city, under the 20 & 21 Vict. c. 43.

On the 10th May, 1865, three several informations were preferred by the respondents who are millers at Shad Thames, against the appellants, jointly charging three offences viz:—that each of them on the three several days hereinafter mentioned in Upper Thames Street, in this city, unlawfully had in their possession, and contrary to the statute, goods to wit: on the 11th April, 1865, twelve sacks, on the 18th April, 1865, nine sacks, and on the 24th April, 1865, fourteen sacks, respectively the property of the respondents, and which goods were then and there and were still reasonably suspected of being stolen and unlawfully obtained.

The informations were laid under the Metropolitan Police Courts Act, 2 & 3 Vict. c. 71, s. 24 (the powers in which are given by the 3 & 4 Vict. c. 84, s. 6, to two city justices, and by 11 & 12 Vict. c. 43, s. 34, to one such justice,) which enacts, "Every person who shall be brought before any of the said magistrates charged with having in his possession or conveying in any manner anything which may be reasonably suspected of being stolen or unlawfully obtained, and who shall not give an account to the satisfaction of such magistrate how he came by the same, shall be deemed guilty of misdemeanour, and shall be liable to a penalty of not more than 5*l.*, or in the discretion of the magistrate may be imprisoned, with or without hard labour, for any time not exceeding two calendar months."

Upon the information being laid, summonses were issued to the appellants commanding them "to appear on the 19th May, 1865,

1866

HADLEY v. PERKS.

before such justice or justices for the city as may then be at the justice room to answer to the said informations, and to give an account to the satisfaction of such justice or justices how they came by the said goods respectively, and to be further dealt with according to law," and the appellants accordingly appeared by themselves and their counsel and attorney, and severally pleaded not guilty to the charges, when an objection was taken by the appellants' counsel that the Lord Mayor had no jurisdiction to entertain the case as they were not properly brought before him, which was by consent reserved until the close of the evidence for the respondents.

Several witnesses were then examined to prove that on the three days alleged in the informations the number of sacks named, marked with the brands of the respondents (amongst a large number of sacks of other owners), were found by an officer (who is also a constable of a society known as the "Sack Protection Society," formed among the millers of the metropolis and the neighbouring counties for the protection of the flour sacks of the members, and for the prosecution of persons having illegal possession of such sacks), at the Steam Flour Mills of the appellants, Joseph Leonard Hadley and Jonah Hadley, in Upper Thames Street, in this city, at which the appellant James Ebden is the foreman. The sacks were filled with offal, pollard, and other things, which renders them entirely useless to the miller afterwards. The appellants were present on the occasions referred to; one of the respondents (who is also the honorary secretary of the society), proved that he and other millers never sell, exchange, or give away their sacks, and identified the several sacks found at the appellants' as his property, stating he did not know how they came out of his custody, but that they must have been sent to bakers his customers with flour, who ought to have returned them. In order to shew the knowledge of the appellants of the custom of millers in relation to their sacks, it was proved that Messrs. Hadley had been for many years members of the Sack Protection Society.

The counsel for the appellants objected to the Lord Mayor's jurisdiction on the following grounds, namely:—1st. That the 2 & 3 Vict. c. 71, s. 24, creates no offence, but that the offence is

created by s. 66 of the Police Act, 2 & 3 Vict. c. 47 (1), which act and 2 & 3 Vict. c. 71, are, by s. 55 of the latter, to be construed together as one act. 2nd. That the appellants ought to have been "brought" before the magistrate, if liable to be brought at all, in custody by a constable (referring to section 69 of 2 & 3 Vict. c. 47 (1) for the meaning of the word "brought.") 3rd. That the class of persons against whom the acts are directed is an erratic class who are wandering about in possession of suspected property with which they would escape if not arrested on the spot, and whom therefore it is necessary to bring before a magistrate to account for the possession. 4th. That s. 24 of the 2 & 3 Vict. c. 71, does not apply to goods in possession of known residents deposited on their premises, for the act in such cases gives the police of their own motion no power of search, but on the contrary the 25th section of the act directs in such cases the issue of a search warrant. 5th. That the 24th section defines the duties of the magistrates when persons are brought before them charged with having or conveying anything stolen or unlawfully obtained, thereby clearly pointing to section 66 of 2 & 3 Vict. c. 47, wherein the constable is directed to stop, search, and detain a party in possession of such goods. (1) 6th. That the whole tenour of

(1) Sections 66 and 69 of 2 & 3 Vict. c. 47, are as follows :—Section 66. "Any person found committing any offence punishable either upon indictment or as a misdemeanour, upon summary conviction, by virtue of this act, may be taken into custody without a warrant by any constable, or may be apprehended by the owner of the property on or with respect to which the offence shall be committed, or by his servant, or any person authorized by him, and may be detained until he can be delivered into the custody of a constable, to be dealt with according to law; and every such constable may also stop, search, and detain, any vessel, boat, cart, or carriage, in or upon which there shall be reason to suspect that anything stolen, or unlawfully obtained, may be found, and also any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained, and any person to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence has been committed with respect to such property, or that the same or any part thereof has been stolen, or otherwise unlawfully obtained, is hereby authorised, and if in his power is required, to apprehend and detain, and as soon as may be deliver, such offender into the custody of a constable, together with such property, to be dealt with according to law." Section 69. "Every person taken into custody by any constable belonging to the Metropolitan Police, without warrant, except persons detained for the mere purpose of ascertaining their name or residence, shall be forthwith delivered into the custody

1866

HADLEY v. PERKS.

the 2 & 3 Vict. c. 71, shews that the legislature meant it to refer to goods which had been stolen or obtained by false pretences, for that it was not intended to give a constable power to arrest any one who had taken possession under circumstances which made him civilly responsible, and that the possession of these sacks having been voluntarily parted with cannot come within either category, being goods which have by accident been intermixed and probably given in exchange for similar goods of the appellants.

Counsel for the respondents contended:—1st. That the 2 & 3 Vict. c. 71, s. 24, does create the offence alleged in the information, separate and independent of any other. 2nd. That the appellants having been summoned to appear, and having appeared in pursuance of the summons, were "brought" before the Lord Mayor within the meaning of 2 & 3 Vict. c. 71, s. 24; reference was made to section 26 (1) as being in pari materiâ with it, to shew that the magistrate might in the case of the person referred to by an offender as the person from whom he received the property, "cause every such person . . . to be brought before him," which would be either by a summons or warrant, and to the form of conviction in the

of the constable in charge of the nearest station house, in order that such person may be secured until he can be brought before a magistrate, to be dealt with according to law, or may give bail for his appearance before a magistrate, if the constable in charge shall deem it prudent to take bail in the manner hereinafter mentioned."

(1) Section 26 of the 2 & 3 Vict. c. 71, is as follows:—"When any person shall be brought before any such magistrate, charged with having or conveying anything stolen or unlawfully obtained, and shall declare that he received the same from some other person, or that he was employed as a carrier, agent, or servant, to convey the same for some other person, such magistrate is hereby authorized and required to cause every such person, and also if necessary every former or pretended purchaser, or other person through whose possession the same shall have passed, to be brought before him and examined, and to examine witnesses upon oath touching the same, and if it shall appear to such magistrate that any person shall have had possession of such thing, and had reasonable cause to believe the same to have been stolen or unlawfully obtained, every such person shall be deemed guilty of a misdemeanour, and to have had possession of such thing at the time and place when and where the same shall have been found or seized, and the possession of a carrier, agent, or servant, shall be deemed to be the possession of the person who shall have employed such other person to convey the same, and shall be liable to a penalty of not more than five pounds, or in the discretion of the magistrate may be imprisoned in any gaol or house of correction within the Metropolitan Police district, with or without hard labour, for any term not exceeding three calendar months."

schedule B to the 2 & 3 Vict. c. 71, wherein the word "brought" is made to apply generally to all defendants by whatever process they appear before the magistrate. 3rd. That the "possession" contemplated by the statute 2 & 3 Vict. c. 71, was not merely manual possession, but any possession, manual or otherwise, which gives the defendant dominion over the articles in respect of which he is charged. 4th. That the 24th section of 2 & 3 Vict. c. 71, is not limited to cases in which the constable has exercised the powers given to him by 2 & 3 Vict. c. 47, s. 66, before cited. 5th. That under that section it is not necessary to prove that the goods in question have been stolen or obtained by false pretences, but that it is sufficient to shew that the owner never parted with his property in them, leaving it for the magistrate to form his own opinion of the appellants' knowledge of that fact, and of the account they gave for the possession of them.

The Lord Mayor being of opinion that he had jurisdiction, evidence was given in reference to the large numbers of millers' sacks always coming into and going out of the appellants' warehouse, amongst which were necessarily a very large number of odd marked sacks, as they had from 20,000 to 50,000 of their own sacks in daily use on their premises; that sacks get frequently intermixed with other sacks; that the Messrs. Hadley lose large numbers of their own sacks in the same way, and that 5 per cent was not an unreasonable quantity of stray sacks for a miller to have in his mills.

Upon due consideration the Lord Mayor was of opinion—1st, That the appellants were properly "brought" before him within the meaning of the enactments quoted. 2nd. That section 24 of the 2 & 3 Vict. c. 71, creates a new offence, additional and summary remedy for protecting property in those cases where an indictment could not be sustained, or it was inexpedient to adopt that course of proceeding, and that, therefore, it was not necessary in this case that there should be positive evidence that an actual larceny or a fraud had been committed with respect to them, reasonable suspicion being sufficient. 3rd. That the appellants had brought themselves within the operation of that section, inasmuch as they had possession of the sacks in question, which were reasonably suspected of being stolen or unlawfully obtained. 4th. That the appellants did not give a satisfactory

1866

HADLEY v. PERKS.

account, as required by the section, how they came by the sacks; and he therefore convicted them of the offence upon each of the three days charged, and adjudged the appellants Hadleys to pay the penalty of 5*l.* for each of those three days, making 15*l.* each; and the appellant Ebden to pay the penalty of 5*s.* for each of those days, making 15*s.*

The question for the opinion of the Court of Queen's Bench was, whether the Lord Mayor was right in point of law in convicting the appellants. (1)

April 21 and 25. *H. S. Giffard, Q.C.* (*Poland* with him), for the respondents. Taking the appellants' objections in the order stated in the case, the first is that the conviction is under section 24 of the 2 & 3 Vict. c. 71, whereas, it is said, section 66 of the 2 & 3 Vict. c. 47 is the section that creates the offence; but it is clear, on reading the two sections, that section 66 creates no offence, but only gives certain powers to a constable to arrest, whereas section 24 makes it a misdemeanour for a person, charged with being in possession of goods suspected to be stolen or unlawfully obtained, not to account to the satisfaction of the magistrate how he came by the same. Secondly, it is said that the Lord Mayor had no jurisdiction, because the appellants were not "brought" before him within the meaning of section 24, not being in custody but only appearing on summons; but the term is equally applicable to either mode. Sections 19 and 20 give power to magistrates to summon any person charged with an offence under this act, which the magistrates may dispose of summarily. Section 26 again uses the same form, which cannot mean that the person named is to be brought in custody.

[LUSH, J. There seem to be three ways by which a person may be brought before the magistrates—by summons, by warrant, and by the act of the constable.]

Precisely; and it would be most unreasonable to say that

(1) The evidence given for the prosecution and by the appellants, together with certain circulars of the Sack Protection Society, was set out at length, in appendices to the case, and the Court intimated in the course of the argument that when evidence and documents are so set out they ought to be numbered in paragraphs, pursuant to R. G. Hil. T. 1862, or the costs would not be allowed.

"brought" in this section must necessarily mean "brought in custody."

[BLACKBURN, J. It certainly would be an unnecessary piece of harshness if you might not summon a man, who you think will not run away, instead of arresting him.]

Again, there is but one general form of conviction of universal application to all offences punishable summarily under this act, given by section 28 and schedule B, and the form is, "Be it remembered that C. D. is brought before me."

[BLACKBURN, J. It is clear that the legislature could not contemplate that the person charged would in every case be brought in custody.]

If "brought" does not extend to a case of appearing on summons, then, although the magistrate would have no jurisdiction if the defendant appeared to the summons, yet if he did not appear, and the magistrate issued his warrant under section 19, he would be brought in custody, and then the magistrate would have jurisdiction, which is absurd. The third and fourth objections are pointed at the class of offenders, and it is said that they are "an erratic class;" but there is nothing in the section to confine it to such a class. The fifth point is also merely an argument as to the construction of section 24, that it is confined to the class of offences in section 66 of the prior act. The sixth point is, that the statutes cannot be intended to apply to a person who has come by goods in such a way as to be civilly responsible, but must be held to apply only to goods stolen or obtained by false pretences. No doubt the statute means more than a mere possession such as would render the possessor civilly responsible; there must be a mala mens; but the objection goes too far, if it is meant to be contended that there must be proof of the goods having been stolen or unlawfully obtained, that is exactly the thing which the legislature intended to dispense with. It is to be observed that the mere possession is not enough, the account given must be unsatisfactory to the magistrate. [He also argued that manual possession was not necessary, but it was sufficient if the goods were on the defendants' premises with their knowledge, and that there was sufficient evidence of knowledge, and that the sacks were unlawfully obtained, being appropriated to a use which rendered it impossible to

1866

HADLEY v. PERKS.

restore them; and also that the account given was such as the magistrate might hold unsatisfactory. (1)]

*Parry, Serjt.* (*Waddy* with him), for the appellants. By section 55 of the later act, the two acts are to be read as one; the one being for regulating and giving certain increased powers to the metropolitan police, and the other supplemental to that to give correlative powers to the magistrates. So reading the statutes, it is obvious that the object of section 66 of the one, and section 24 of the other, is in the one to arrest, and in the other to punish, the same class of offenders, and only the same class; and it is beyond all doubt that, taking the whole of section 66 (which is very similar to section 7 of 10 Geo. 4, c. 44), it refers to vagrant or locomotive offenders, erratic, as they are called in the case; the constable is "to stop, search, and detain," shewing that the person is to be on the move, "reasonably suspected of having or conveying," that is, having on his person, or with him, or otherwise conveying. Possession in houses is dealt with in a very different way by section 25 (2), and it is under that section that the appellants ought to have been dealt with; but then the goods must have been proved to have been stolen or unlawfully obtained, proof of which was altogether wanting.

[BLACKBURN, J. At present we are not considering the evidence

(1) The arguments on these points turned chiefly on the evidence as set out in the appendix.

(2) 2 & 3 Vict. c. 71, s. 25. "If information shall be given on oath to any of the said magistrates that there is reasonable cause for suspecting that any thing stolen or unlawfully obtained is concealed or lodged in any dwelling-house, or any other place, it shall be lawful for such magistrate, by special warrant under his hand directed to any constable, to cause every such dwelling-house or other place to be entered and searched at any time of the day, or by night if power for that purpose be given by such warrant; and the said magistrate, if it shall appear to him necessary, may empower such constable, with such assistance as may be found necessary, such constable having previously made known such his authority, to use force for the effecting of such entry, whether by breaking open doors or otherwise; and if upon search thereupon made any such thing shall be found, then to convey the same before a magistrate, or to guard the same on the spot until the offenders are taken before a magistrate; or otherwise dispose thereof in some place of safety, and moreover to take into custody and carry before the said magistrate every person found in such house or place who shall appear to have been privy to the deposit of any such thing, knowing or having reasonable cause to suspect the same to have been stolen or otherwise unlawfully obtained."

in detail; the question is, does not section 24 apply equally to a man brought up by a general warrant under section 25, as under section 66 of the prior act? It is true there was no arrest at all in this case, but I do not think actual arrest is material.

LUSH, J. If section 24 followed section 25 instead of preceding it, there would not be much difficulty in saying section 24 applied to cases under section 25 as well as under section 66; section 25 attaches no punishment.]

Section 25 only applies to cases where goods can be proved to have been stolen or unlawfully obtained, a totally different state of circumstances from that contemplated under sections 24 and 26; and the previous law was sufficient to deal with offenders brought up under section 25. Section 26 further bears out this view, for it clearly refers to actual or rather personal possession coupled with the notion of conveying by the defendant himself, or an innocent agent.

[BLACKBURN, J., intimated that the Court desired to hear counsel for the respondents upon the point, whether jurisdiction under section 24 is not confined to cases in which a constable could arrest under section 66; whether the having in possession is not confined to having in possession or conveying in an erratic mode.]

*Poland*, in reply. Section 24 was intended to dispense with the proof that the goods were actually stolen; there are many cases where there is no moral doubt that goods have been stolen, but legal proof altogether fails. Why should this be confined to cases of possession in the street? or why should an actual arrest be necessary?

[BLACKBURN, J. I believe we are all agreed that actual arrest is not necessary to give jurisdiction; at all events that may be assumed for the present argument.]

The argument derived from section 25, that you must have a search warrant, and lay an information that the goods have been actually stolen, has no weight. That applies to a case where the goods are concealed. But if a marine store dealer offers an article for sale in his shop, which the person to whom it is offered suspects to be stolen, why is not the store dealer having the thing in his possession just as much liable as if he were in the street?

[SHEE, J. Section 27 applies to such a case as that.]

1866

HADLEY v. PERKS.

The man's guilt would be the same.

[SHEE, J. But the reason for arresting a person who is likely to escape does not hold good.]

Put, then, the case of a man who is watched into his shop; and the constable on going into the shop finds an article of jewellery on the counter, just deposited there by the man. Why may the constable not act; or is the mere fact of not being arrested in the street to make all the difference? Surely possession of any kind and anywhere is sufficient, provided always that a satisfactory account cannot be given. It is admitted that section 24 applies where no owner can be found.

[BLACKBURN, J. That no doubt was what the legislature intended.]

If, then, after a search warrant under section 25, goods are found and seized, but afterwards proof of ownership fails from want of identification; then section 24 supplies the want, and you can deal with the offender if he gives an unsatisfactory account of how he became possessed of them. Section 26 enables a magistrate to have brought before him any other person who is named by the person charged as the person from whom he got the goods, and the magistrate is enabled to convict the person named with a larger amount of imprisonment, if it be proved that he had possession, and had reasonable cause for believing them to have been stolen or unlawfully obtained; but it does not follow that the person had possession in the street; it may be anywhere, even out of the magistrate's jurisdiction. Possession must be used in the ordinary sense there, either in a house or on a man's person; and why not in section 24 also? So again, if a broker be summoned under section 27, and it cannot be proved that the goods were stolen, but it is proved that there is reasonable cause for supposing them to have been stolen, why should not section 24 come into operation, and the magistrate be able to call upon the broker to give an account to the magistrate's satisfaction of how he came by them, and if he fail, convict him?

[BLACKBURN, J. If that were intended, the order of the sections would naturally have been reversed, though the present order is by no means conclusive.]

If the Court confines possession in section 24 to possession in

the street, then possession must have two different meanings in the same statute.

BLACKBURN, J. We are all agreed that the conviction was wrong upon the ground which my Brother Parry has put before us, viz., that the 24th section of the 2 & 3 Vict. c. 71 does not extend to such a case as the present. The 24th section is as follows: "That every person who shall be brought before any of the said magistrates" (in which, by subsequent enactments, a city magistrate is included) "charged with having in his possession or conveying in any manner anything which may be reasonably suspected of being stolen or unlawfully obtained, and who shall not give an account to the satisfaction of such magistrate how he came by the same, shall be deemed guilty of a misdemeanour, and shall be liable to a penalty of not more than 5*l.*; or, in the discretion of the magistrate, may be imprisoned with or without hard labour for any time not exceeding two calendar months." Thus a very extensive summary power of conviction is given under certain circumstances. We are to see what those circumstances are. Now, taken by themselves alone, the words "having in his possession" of course include the case of a person having in his possession, at any time, in any manner, or in any place. But here we have them in connection with the words "or conveying in any manner anything which may be reasonably suspected of being stolen or unlawfully obtained." It is no offence at common law, nor is it, except under the 66th section of the earlier act, an offence against any statute, for persons to have in their possession things suspected of having been stolen. The offence at common law would be having a guilty knowledge that the things were actually stolen. We must see, therefore, what it is to which these words are intended to apply. Now, in the previous act, 2 & 3 Vict. c. 47, (which was passed in the same session, the two going through the legislature contemporaneously, one of them being meant to regulate the metropolitan police constables, and the other the police courts, the 55th section of the second act requiring that they shall be construed and read as one act,) we have this power given by section 66: "And every constable may also stop, search, and detain any vessel, boat, cart, or carriage in

1866

HADLEY v. PERKS.

or upon which there shall be reason to suspect that anything stolen or unlawfully obtained may be found, and also any person who may reasonably be suspected of having or conveying in any manner anything stolen or unlawfully obtained; and any person to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence has been committed with respect to such property, or that the same, or any part thereof, has been stolen or otherwise unlawfully obtained, is hereby authorized, and, if in his power, is required, to apprehend and detain, and as soon as may be to deliver such offender into the custody of a constable." Here there is a power of arrest given, which was not given by the common law. Under the common law if a felony were actually committed a person might be arrested without a warrant by any one, if he were reasonably suspected of having committed the felony; and a constable could go further: if he had reasonable ground for supposing that a felony had been committed, and reasonable ground for supposing that a certain person had committed the supposed felony, he might arrest him, though no felony had actually been committed; but neither a constable, nor any one else, could arrest a person merely on suspicion of his having illegally obtained goods. This is a misdemeanour, and a power of arrest is given with respect to it quite beyond the common law. That power is given by the 66th section, and we must look at that section, to see what the power given to the constable is. Where any person is reasonably suspected of having or conveying anything stolen or unlawfully obtained, the constable is authorized to arrest him in transitu in the street; and one can see at once that very good reasons could be given for this summary power to do what could not be done elsewhere. It might be expedient to give the power to arrest such persons, because they might otherwise very speedily get out of the way, and not be taken at all, though it might not be expedient to give the same power to arrest them when the goods are found in a house. There is also a further summary power given to a person to whom suspected goods are offered to be sold or to be pawned, to arrest the person offering them; and there are clearly the same reasons why a person who has received the goods and unlawfully tenders them to a pawnbroker should be arrested, because if not arrested he might pro-

bably speedily disappear. The legislature has therefore required that the constable or other person should arrest the suspected person summarily under the given circumstances. But the power of arrest given by the statute is confined to these particular cases. The one where the person is "having or conveying" the goods; the other where the goods are tendered by him for sale or pledge. Now, this being the case, I think it throws a good deal of light upon the 24th section of c. 71, and we must take that and read it as a part of the same statute. Here is a power given of summarily arresting those who are found "having or conveying," evidently persons moving about the streets "having or conveying." Further, a summary power of arrest is given to the person to whom the goods are offered for sale or pledge. And I am inclined to think that the same construction would extend section 24 to the case of a man who had been actually taken by the person to whom he had offered the goods for sale or pledge, as to a person arrested in the streets by a constable; but it is not necessary to decide that.

It has been a general rule for drawing deeds and other legal documents from the earliest times, which one is taught when one first becomes a pupil to a conveyancer, never to change the form of words unless you are going to change the meaning, and it would be as well if those who are engaged in the preparation of acts of parliament would bear in mind that that is the real principle of construction. But in drawing acts of parliament, the legislature, as it would seem, to improve the graces of the style, and to avoid using the same words over and over again, constantly change them; and accordingly in section 24 we have "having in *possession* or conveying in any manner anything," whereas the words in section 66 of the previous act were "having or conveying." I think, however, that the two expressions were intended to mean the same thing. "Having in his possession" may perhaps have been introduced to meet the case of the person who arrested the man when he came to offer the goods for sale or pledge. But "having or conveying" I think must be limited, making the one co-extensive with the other, and confining it to "having" ejusdem generis with "conveying."

Then there follow some other sections, and here again we shall have to look to see whether the meaning is extended. In the first place, according to the common and ordinary rule of interpretation

1866

HADLEY v. PERKS.

we should not expect to have the 24th section relating to the subject of the 25th section. The proper way would be, if it was meant that the 24th section should relate to matter in the 25th, to make it follow it, and to put the 25th in the place of the 24th. This is by no means conclusive, but still it is a reasonable principle of construction. Then we find in the 25th section there is power to issue a search warrant; that search warrant, following the ordinary and general rule, is to be granted only if there is information on oath that there is reasonable ground for suspecting that goods stolen or unlawfully obtained are lodged in a certain place. The information must be, therefore, not that things *suspected* to be stolen or unlawfully obtained are lodged there, but that things *actually* stolen or unlawfully obtained are suspected to be lodged in the house. Upon this information the search warrant may be issued, and it is necessary in order to justify the breaking and entering the house. In addition to that there is given a general power or warrant to the constable "to take into custody and carry before the magistrate every person found in such house or place, who shall appear to have been privy to the deposit of any such thing, knowing, or having reasonable cause to suspect, the same to have been stolen or otherwise unlawfully obtained." The constable, at common law, when he had taken the goods under this warrant having reason to believe that a felony had been committed, if he had reason to think that a person found there was a party to the felony, probably might arrest him, whether in the house or out of it. But here there is power given him to take a person into custody in the case of goods which have been unlawfully obtained. The whole of the section, however, is confined to the case where there has been information on oath that the things have been actually stolen or unlawfully obtained. But the mischief intended to be met by sections 66 and 24 was evidently that of suspected goods being carried along the streets; as where there is a bag of coffee, for instance, found on a man, and there is reason to believe that it has been pilfered from some ship or warehouse, but from which particular ship or warehouse it is difficult to prove. If a man is found carrying anything of this kind along the street, there is a summary power to arrest him, and to punish him; but I think in the case of the search warrant there must be an information on oath

that the goods have actually been stolen or unlawfully obtained.

Then again, with regard to the 26th section, it is very oddly worded. Where the person is brought before the magistrate charged with having goods in his possession actually stolen, and he gives information from whom he got them, the person he mentions may be brought before the magistrate, and instead of, as is the case under the 24th section, imposing a fine, or sending him to prison for two months, the magistrate, if he find he had the goods in his possession, and had reasonable cause to believe the same to be stolen or unlawfully obtained, may send him to prison for three months,—a different offence, with a heavier punishment. We have not this 26th section, however, before us now, and the question need not be decided; but it seems to apply only when the things are actually stolen or unlawfully obtained, and not also when there are only grounds for suspecting that they have been stolen or unlawfully obtained.

Then there comes the other argument that I have mentioned before, which is, that the 24th section comes before the 25th and 26th; and one would naturally expect that if the 24th section was meant to apply to cases under the 25th and 26th, it should follow them. The interpretation of the words taken fairly, and taking the 66th section of the previous act with it, is, that "having in possession" and "conveying" in the 24th section mean the "having and conveying," mentioned in the 66th section, that authorize the summary arrest. I think, where there is this summary power of conviction given with a power of sentencing to imprisonment and hard labour, the proper construction of the act is that which I have already mentioned, and that the legislature did not intend to oust a person from his right of trial by jury, except in the particular case to which I have referred. I think the words of the statute sufficiently shew that the legislature intended to confer this summary power only in the case where a person was "having and conveying" in the sense of "having" ejusdem generis with "conveying," being in the streets or roads with them, or carrying them about, or perhaps loitering in the streets in such a way that it might be assumed he was carrying them, and probably in the case of his being taken into custody

1866

HADLEY v. PERKS.

when he has brought them to a pawnbroker, or to a person to whom he offers them for sale. I think, therefore, the Lord Mayor has exceeded his jurisdiction; for there is no pretence for saying that the present case came within that class of offences mentioned in sections 25 and 26.

If this had been a case in which summary arrest would have been lawful, I can scarcely think it would have been sufficient to oust the magistrate of his jurisdiction, if knowing that the constable might have taken a person into custody, he had allowed him to be summoned instead. But on the other ground, I do not think the case comes within the act which gives the summary power, and consequently the conviction must be reversed, and judgment given for the appellants.

SHEE, J. I am of the same opinion. It appears to me that the 24th section of the 2 & 3 Vict. c. 71, is merely supplementary, and enacted for the purpose of giving full effect to the provisions of the 66th section of the 2 & 3 Vict. c. 47. That section enacts that it shall be lawful for any constable to apprehend any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained; and it enacts also that it shall be lawful for any person to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence has been committed, to apprehend and detain the person so offering the things. And then the 69th section of that statute provides: "That every person taken into custody by any constable belonging to the metropolitan police, without warrant, except persons detained for the mere purpose of ascertaining their name or residence, shall be forthwith delivered into the custody of the constable in charge of the nearest station house, in order that such person may be secured until he can be brought before a magistrate, to be dealt with according to law." Now it seems to me that the 66th section of the 2 & 3 Vict. c. 47 applies only to offences, or to the suspicion of offences, out of doors—to street offences, cases in which circumstances occur in the street, which give reason to suspect that property has been stolen or unlawfully obtained. And it seems to me that the 69th section is totally inadequate to the prevention of such offences, because after providing that the

offender shall be delivered into the custody of the constable, and shall be brought before the magistrate by the constable to be dealt with according to law, it does not explain how he is to be dealt with according to law. It is plain that before that act passed the magistrate could have done nothing but discharge him, there being no proof that he had actually stolen or received things knowing them to have been stolen, or that the goods were stolen. Therefore the magistrate could have done nothing but discharge him. To supply that defect in the 2 & 3 Vict. c. 47, an act was passed only a week afterwards, in the 24th section of which it is provided, that every person who shall be brought before any of the magistrates charged with having in his possession or conveying in any manner anything which may be reasonably suspected of being stolen or unlawfully obtained, and who shall not give an account to the satisfaction of such magistrate how he came by the same, shall be deemed guilty of a misdemeanour. Now it seems to me that section 66 of the former act, and the 24th section of the 2 & 3 Vict. c. 71, relate only to street offences, or to the suspicion attaching to persons having in their possession or conveying things in the public streets—things which are in the view of the constable, or which in the ordinary course of the constable's employment might be brought to his notice; and I think that the Lord Mayor was mistaken in convicting the appellants under the 24th section. The proper section under which to proceed against the appellants would have been the 25th section; but then no doubt it was felt that it would be impossible to take the preliminary step required by that section, of making an information upon oath that the sacks had been stolen or unlawfully obtained. The 25th section seems to me to apply exactly to a case of this kind, where any person who can upon oath state that the things which are concealed or lodged in any dwelling-house or any other place have been stolen or unlawfully obtained; but section 24 does not apply, and therefore judgment ought to be for the appellants.

LUSH, J. I am also of opinion that the 24th section of the 2 & 3 Vict. c. 71, is merely supplementary to the 66th section of the prior act, and that for two reasons. First, that some such provision is necessary in order to effectuate the purposes contemplated by the 66th section. That section supposes that a person is found

1866

HADLEY v. PERKS.

in a public street with property upon him under such circumstances that there is good reason for suspecting that the property has been improperly come by—stolen; and that if he were not apprehended at once he might get out of the way, and evade detection altogether. Power is therefore given to stop such a person, without any proof or knowledge on the part of the constable that the property is stolen, but merely on suspicion. But then it would be useless to do that unless something could be done with the person when he was brought before the magistrate. Therefore some additional provision was necessary. At common law, if he were brought before a magistrate, and there were no proof given that the things were stolen, he would be discharged; therefore that section would have been inoperative unless it had been followed up by some such provision as that of the 24th section. And under the 24th section one would reasonably expect to find that the offence would be punishable in some way or other. Hence we find the 24th section adapted to this state of things. It makes it an offence for a person to have in his possession, or convey in any manner, anything which may be reasonably suspected of being stolen or unlawfully obtained, without being able to give a satisfactory account of how he came by it. The second reason is founded upon the structure of the 24th section itself. It does not say, as though it were creating a new offence, "if any person have in his possession any property reasonably suspected of being stolen, without being able to give a satisfactory account of it, he shall be guilty of a misdemeanour," but it begins in this way: "That every person who shall be brought before any of the said magistrates charged with having in his possession, or conveying in any manner, anything which may be reasonably suspected of being stolen or unlawfully obtained, and who shall not give an account to the satisfaction of such magistrate how he came by the same, shall be deemed guilty of a misdemeanour." The very structure, therefore, of the section refers one back to a previous provision, enabling the person to be brought before the magistrate. That we find in the 66th section of the prior act. I am, therefore, of opinion that the 24th section is merely a supplement to the 66th section, and applies to the class of cases that would justify the apprehension of persons under section 66, and to no others.

For these reasons I am of opinion that judgment should be for the appellants.

1866

HADLEY v. PERKS.

*Judgment for the appellants, without costs.*

Attorneys for appellants: *Wontner & Son.*
Attorneys for respondents: *Humphreys & Morgan.*

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CHAPMAN *v.* GWYTHER.

*May 5.*

*Warranty, on sale of horse, construction of—"Warranted sound for one month."*

On the sale of a horse the seller signed the following warranty:—"June 5, 1865. Mr. C. bought of Mr. G. G. a bay horse for ninety pounds, warranted sound. 90*l.*—G. G. Warranted sound for one month.—G. G.":—

*Held*, that the latter words limited the duration of the warranty, and meant that the warranty was to continue in force for one month only; and that complaint of unsoundness must therefore be made by the purchaser within one month of the sale.

1 Aff Cas 322-9 En D 178

FIRST count, that the defendant by warranting a horse to be sound for a month sold the horse to the plaintiff, yet the horse was not sound then or for a month according to the warranty.

Second count, that the defendant by warranting a horse to be sound and right for one month, from the date of delivery of the horse to the plaintiff, sold the horse to the plaintiff, yet the horse was not sound or right then or for one month from the date of such delivery to the plaintiff.

Pleas. First, to the first count, that the horse was sound at the time of the alleged warranty. Second, to the second count, that the defendant did not warrant as alleged. Third, to the second count, that the horse was sound at the time of the alleged warranty. Issues thereon.

At the trial before Blackburn, J., at the sittings in London, after Michaelmas Term, 1865, it appeared that the plaintiff is a horse dealer at Cheltenham, and the defendant a farmer in Pembrokeshire. On the 5th July 1865, the plaintiff's father bought two horses for him of the defendant in Pembrokeshire, and the defendant then signed the following memorandum:—

1866

CHAPMAN v. GWYTHER.

"Trewent, June 5th, 1865.

Mr. Chapman bought of Mr. G. Gwyther, a brown horse six years old, warranted sound, for the sum of one hundred and eighty pounds. 180*l.* 0*s.* 0*d.*

Also a bay horse five years old, for the sum of ninety pounds. Warranted sound. 90*l.* 0*s.* 0*d.*

George Gwyther.

Warranted sound for one month.

George Gwyther."

Two or three days afterwards the plaintiff sent the defendant a cheque for 270*l.* payable to the defendant or order, and on the back of it was written, "This check is received by me for a brown gelding, price 180*l.*, also a bay gelding, price 90*l.*, both of which animals I warrant sound and right for one month from the date of delivery."

The defendant did not indorse the cheque, which, however, was paid by the bank without his indorsement, but the defendant was afterwards requested by the manager of the bank to indorse the cheque; the defendant read the memorandum, and refused to put his name so as to make it a signature to the memorandum, but he signed his name in another part of the back of the cheque.

The horses were delivered to the plaintiff on the 12th June; the bay horse was examined and considered sound till the 8th July, when he was discovered by an intending purchaser to be lame, and subsequent examination proved him to have navicular disease. The plaintiff wrote to the defendant on the 9th July, informing him of this.

The learned judge ruled that the writing on the cheque was immaterial, and left three questions to the jury. 1st. Was there unsoundness (1), disease or seeds of disease, at the date of the sale, viz., 5th June? 2nd. Was there unsoundness, disease or the seeds of it, on the 5th July? 3rd. If on the 5th June there were seeds of disease, had they developed into actual disease on the 5th July? The jury found that the horse was actually unsound on the day of the sale, 5th June, but unknown to the defendant. A verdict was entered for the plaintiff for 82*l.* 4*s.* the amount claimed; leave being reserved to the defendant to move to enter

(1) Referring to Parke, B.'s, judgment in *Kiddell v. Burnard*, 9 M. & W., at p. 669

a nonsuit, if the Court should be of opinion that on the true construction of the warranty the unsoundness must be discovered and notified before the lapse of one month from the day of sale.

*H. S. Giffard, Q.C.*, obtained a rule nisi accordingly, it to be open to the plaintiff, on the argument of the rule, to contend, if necessary, for a new trial, on the ground that the duration of the warranty, was extended, by the indorsement on the cheque, to the 12th July.

*Matthews* and *Moir* shewed cause. The plaintiff is entitled to keep his verdict. The words are the words of the warrantor, and must be taken most largely against him. The grammatical construction is also in favour of the plaintiff; "warranted sound for one month," is a warranty that the horse is and will be sound for one month; the defendant's construction requires the words to be read, "warranted for one month sound." Again, the defendant's construction goes in defeasance of the contract, and there must be clear words to work that effect. In all the cases in which a limited warranty has been maintained, there have been clear words imposing the limitation. Thus in *Bywater* v. *Richardson* (1), "the warranty was to remain in force" for a given time. So in *Mesnard* v. *Aldridge* (2), and *Buchanan* v. *Parnshaw* (3), there were express words having reference to the duration of the warranty. In order, therefore, to defeat the generality of the warranty, clear and explicit terms must be used, which are wanting here. Secondly, if the plaintiff is not entitled to keep his verdict, he is entitled to a new trial, as the learned judge ought to have left to the jury the question whether the true contract was not that contained in the indorsement to the cheque, and if it was, then, even on the defendant's construction of the contract, the plaintiff's complaint was in time, being before the 12th July.

*B. T. Williams*, in support of the rule. The indorsement might have been evidence of a contract had no contract been drawn up; but it is beyond all question that the contract of the parties was reduced to writing by the document stating price and warranty. The defendant's construction of the original warranty is the true one, viz., that it is to limit the duration of the warranty. When words will

(1) 1 Ad. & E. 508. (2) 3 Esp. 271.
(3) 2 T. R. 745.

1866

CHAPMAN v. GWYTHER.

admit of two constructions, that which is most likely to be meant, looking at the position of the parties, is to be taken in preference to the more improbable meaning; and looking at the position of the parties, and the words already written, it is clear the additional words were intended to limit and not to extend the usual warranty on the sale of a horse. A warranty never goes beyond the time of sale as a general rule. No doubt a warranty for the future might be sustained, but there must be words clearly expressive of such an intention, as in *Liddard* v. *Kain.* (1)

BLACKBURN, J. We are all agreed that the rule should be absolute to enter a nonsuit. First, we think that there can be no doubt upon the question which of the two writings, the memorandum of the 5th of June, or the writing on the back of the cheque, constituted the contract, and that I was right in withdrawing the latter altogether from the consideration of the jury. The writing on the cheque might have been evidence of wha the terms of the contract had been, but it was not the bargain itself, and when we have the written contract we must look at that and that alone; this point, in fact, was not much pressed upon us. The real question is, taking the writing of the 5th June, "warranted sound," with the defendant's signature, and then "warranted sound for one month," what is the true construction of it? The words will admit of the construction that the vendor undertakes that the horse is now sound, and will continue sound for one month; but that would be a most improvident bargain, and a very unlikely one for anyone to enter into. It would be much more likely that the words "for one month" were intended to apply to the duration of the warranty itself. And that this was likely to have been the intention of the parties, is shewn by the consideration of what is a common practice in the transactions of horse dealing. Now, as long ago as the year 1788, we find Mr. Bearcroft saying in his argument of the case of *Buchanan* v. *Parnshaw* (2): "Where a horse is objected to as unsound, it is extremely material that he should be returned within a certain time, to prevent all disputes respecting the time when the horse became unsound; because if no objection were to be made on that account

(1) 2 Bing. 183; 9 B. Moore, 356. (2) 2 T. R. 745.

till a long interval had elapsed, the unsoundness might perhaps be occasioned in that interval. And it is for that reason that it is made a condition of sale at all public auctions, that the horse, if objected to as unsound, shall be returned within a short limited time." Lord Kenyon, C.J., assents to the existence of this practice, and to its good sense, adding that the same reasoning does not apply to a warranty of age. I use this to shew that so long ago as 1788, persons were accustomed to limit their liability on a warranty of soundness on the sale of a horse within a given time; and it therefore would seem likely that the parties in the present case were meaning to express, though very inartificially, that common term in such bargains, viz., that the warranty was only to continue in force if complaint were made by the purchaser within a limited time, viz: one month of the sale; the intention being, not to extend the warranty as to soundness, but to limit it to soundness at the time of sale, with the further limitation that the warranty was only to continue for one month. The words clearly admit of that construction, and taking the general rule, we are to consider what the intention is as expressed by the words used, not as used by anybody, but as used by parties dealing in transactions like the present. I may observe that Lord Kenyon's observations in *Buchanan* v. *Parnshaw* (1) are repeated in the last edition of Oliphant on Horses, p. 45. I am therefore of opinion that the meaning of this warranty is that the horse is warranted sound, provided that complaint must be made of the unsoundness within one month from the date of sale; and consequently that the rule to enter a nonsuit should be made absolute.

MELLOR, J. I am of the same opinion. When I first heard the warranty read, I was rather inclined to think that there was not sufficient to enable us to put what is certainly the reasonable construction on it. But on consideration I quite agree with my Brother Blackburn that the true rule of construction is, that we are not to put a meaning on the words used in the abstract, but as used with reference to a horse transaction; and so looking at the words "warranted sound for a month," I think they were intended to impose a limitation in point of time. "I warrant the horse to be sound, but you shall have a month's time only for trial and

(1) 2 T. R. 745.

1866

CHAPMAN v. GWYTHER.

examination; and though I do warrant, I only intend to be bound if you discover any defect and make complaint within a month of the sale." That is what I think the parties must be taken to have intended; and consequently the plaintiff's complaint came too late, and he ought to have been nonsuited.

LUSH, J. I am of the same opinion. We are to put such a meaning, if possible, on the words used as to express the real intention of the parties. Now, it cannot be doubted that the seller intended, not to extend, but to limit the ordinary liability on a warranty of soundness. If the horse be simply "warranted sound," the buyer may claim damages, at any time within the time limited by the statute of limitations, for the breach, by shewing the horse had disease or the seeds of disease at the time of sale; and the longer time that elapses between the sale and the complaint the more difficult and expensive the question becomes. Therefore a person dealing in horses might very reasonably say, any dispute as to soundness shall be determined within a given time; and the defendant has expressed this in a very compendious form. He must have meant, "I won't be liable on my warranty unless complaint be made within a month." In order to put the construction contended for by the plaintiff, that the horse is warranted, not only sound now, but to continue sound for one month, some words must be inserted which the rules of law prevent. Whereas "warranted sound for one month," expresses without more that the horse is warranted for one month, that is, that the warranty shall continue in force for one month. The plaintiff failed to prove a breach within the meaning of this contract; and I quite agree that the contract is contained in the original document, and that the indorsement on the cheque has no effect whatever.

*Rule absolute.*

Attorneys for plaintiff: *Pawle & Lovesy.*
Attorney for defendant: *Beddome.*

THE QUEEN *v.* SIR GEORGE GREY, BART. 1866
May 7

*Salmon Fishery Act*, 1865 (28 & 29 *Vict. c.* 121), *ss.* 3, 4, & 5—*Jurisdiction of Secretary of State to form fishery districts.*

Under the Salmon Fishery Act, 1865, 28 & 29 Vict. c. 121, ss. 3, 4, & 5, when the justices of any county in quarter sessions have applied to the Secretary of State to form into a fishery district any river lying wholly or partly in their county, the Secretary of State has jurisdiction by his certificate to enlarge the limits of the district to any extent, in the same and the neighbouring counties, that he in his discretion may think fit.

THIS was a rule calling on Sir George Grey, Bart., one of Her Majesty's principal Secretaries of State, to shew cause why a writ of certiorari should not issue to move into this Court a certificate under his hand, as the Secretary of State for the Home Department, for the formation of the "Tees Fishery District," under the Salmon Fishery Act, 1865.

The river Tees divides the county of Durham from the North Riding of the county of York.

At the North Riding quarter sessions, holden on the 17th October, 1865, the justices then assembled (due notice having been given according to the practice of the sessions) passed the following resolution: "That pursuant to section 4 of the Salmon Fishery Act, 1865, application by writing under the hand of the chairman be made to the Home Secretary to form into a fishery district so much of the river Tees as is situate below the High Ford, together with its tributaries within the county of Durham and the North Riding of Yorkshire, including such portion of the estuary of the river Tees as is situate between Tod Point in the parish of Kirkleatham, in the said riding, and the south end of the village of Seaton Carew, in the said county of Durham." A copy of this resolution, signed by the chairman of the quarter sessions, was forwarded to the Secretary of State.

At the Durham quarter sessions, holden on the 16th October, 1865, a resolution in precisely the same terms was passed.

Early in the month of December an advertisement was published in the local newspapers, and in the London *Times*,

1866

THE QUEEN v. SIR GEORGE GREY.

announcing that the Home Secretary intended to grant a certificate forming into a salmon fishery district the river Tees, the limits of which district were defined, and included the whole of the river in the two counties, and a much more extended district of the Yorkshire and Durham coast than had been included in the above resolutions.

The justices at the Durham quarter sessions were willing to adopt the Secretary of State's district; but the North Riding quarter sessions objected, and a correspondence ensued, the Secretary of State saying that the Inspectors of Salmon Fisheries had recommended the more extended district, so as to reach midway between the Tees and the river Wear, on the north, and the river Esk, on the south.

On the 19th January, 1866, the Secretary of State granted the following certificate, which was in conformity with the previous notice:—

"Salmon Fishery Act, 1865.

The limits of the fishery district of river Tees shall be as follows: So much of the river Tees and its tributaries as is situate within the counties of Durham and the North Riding of York, and also the estuary of the said river, and so much of the coast as lies between the north side of the stream flowing near Hardwick Hall, in the county of Durham, and the south side of the stream at Skinningrove, in the county of York, and all rivers flowing into the sea between the said points and being within the said counties, as laid down on the annexed map deposited in the office of the clerk of the peace for the county of the North Riding of York.

I do hereby certify that the fishery district above described is duly formed by me.

Given under my hand this 19th day of January, 1866.

Home Office. G. Grey."

*The Solicitor General*, and *Hannen*, shewed cause. The Secretary of State had full power, when forming the Tees district, to include such portions of the two counties of Durham and Yorkshire as in his discretion he thought fit. Sections 3, 4, & 5 of the Salmon Fishery Act, 1865, 28 & 29 Vict. c. 121, shew that the Secretary of

State, and he alone, has power to fix the limits. (1) The quarter sessions have only power to apply generally to the Secretary of State to form all or any of the rivers in their county into a fishery district, and he, by his certificate, is to define the limits of the district, including in it rivers in other counties if he thinks good; and in order that persons interested may have an opportunity of interfering, a month's previous notice of the intended limits is to be given. Similar powers are given under sections 19 & 20 to the Secretary of State to alter districts already formed. They cited *Ex parte Smith* (2), *Rutter* v *Chapman*. (3)

*Mellish, Q.C.*, and *Simpson*, in support of the rule. The Secretary of State can only include in a district the river with its tributaries with respect to which the application is made; otherwise why

(1) Sections 3, 4, and 5 of the 28 & 29 Vict. c. 121, are as follows: "s. 3. In this act, and the Salmon Fishery Act, 1861, the following words shall have the meanings hereinafter assigned to them, unless there be something in the subject or the context repugnant to such construction, that is to say:—

"'River' shall include such portion of any stream or lake with its tributaries, and such portion of any estuary, sea, or sea coast, as may from time to time be declared, in manner hereinafter provided, to belong to such river:

"'Salmon river' shall mean any river, as above defined, frequented by salmon or young of salmon.

"s. 4. The justices of a county, at any court of quarter sessions held after the passing of this act (due notice having been previously given according to the practice of the said sessions) may, by writing under the hand of their chairman, apply to one of Her Majesty's principal Secretaries of State to form into a fishery district or districts, all or any of the salmon rivers lying wholly or partly within their county, and the said Secretary of State may form such district or districts accordingly, and may include in any district so formed any river or rivers, or parts thereof, although not situated in the county on behalf of which the application is made.

"s. 5. The limits of a river shall be defined for the purposes of this act, and a fishery district shall be formed, by a certificate under the hand of one of Her Majesty's principal Secretaries of State, describing the limits of the river or district by a reference to a map or otherwise, as to the said secretary may appear expedient, but no such certificate shall be granted, unless one month's previous notice of the intention of the said secretary to grant the same, and of the intended limits of the river or district, has been given by advertisement in such newspaper or newspapers published or circulated within the intended limits, and in such daily morning newspaper or newspapers published in London, as may be directed by the said Secretary of State, and when a certificate has been granted a copy shall be advertised in such newspaper or newspapers."

(2) 1 B. & S. 412.

(3) 8 M. &. W. 1.

1866

THE QUEEN v. SIR GEORGE GREY.

should application by the sessions be necessary at all? The sessions are to apply to the Secretary of State to form any river or rivers into a district, and the Secretary of State "shall form such district *accordingly*." The Secretary of State has no means or machinery of calling persons before him and examining into the matter; whereas the justices in quarter sessions have the means, and, above all, have local knowledge.

BLACKBURN, J. I am of opinion that this rule must be discharged. The question turns on the construction of the Salmon Fishery Act, 1865, which is not so express in its terms as to be perfectly clear, though I do not think there can be much doubt in the matter. Section 1 explains the terms used, and "'river' shall include such portion of any stream or lake, with its tributaries, and such portion of any estuary, sea, or sea coast, as may from time to time be declared, in manner hereinafter provided, to belong to such river." Therefore "river" is used in its popular sense, and "river" may also be used so as to include the neighbouring sea coast. And then "'salmon river' shall mean any river as above defined frequented by salmon or young of salmon." By section 4 the justices of any county in quarter sessions may apply to the Secretary of State to form into a fishery district all or any of the salmon rivers lying wholly or partly within their county; but the mode in which the district is to be formed, and its limits declared, is by the certificate of the Secretary of State, which presumably is to be after and not before the quarter sessions have initiated the proceedings, by applying to him stating that it is fit that a certain river or rivers should be formed into a district; so that the Secretary of State has no jurisdiction until the quarter sessions have determined the primary question of forming their rivers into a district; and when they have done this, then the legislature have intrusted to the Secretary of State the duty of carrying out the object of the justices; and although no limit is apparently put on his power, the legislature presumes, no doubt, that he will, of course, act reasonably in the formation of any proposed district. That the power to "form" the district is in the Secretary of State alone is shewn clearly by the clause at the end of section 4, which enacts that the Secretary of State "may form such district accordingly,

and may include in it any river, or parts thereof, although not situate in the county on behalf of which the application is made;" and I do not see how the justices of Durham or Yorkshire would have any jurisdiction to say what should be the limits of a district in the other county; and it is reasonable that this should be left to the determination of an independent authority like the Secretary of State. Section 5 states how the Secretary of State is to form the district, by declaring the limits in a certificate under his hand; but he is to give a month's previous notice of the intended limits, in order that the persons interested in the county which has applied, or in the neighbouring counties, if affected by it, may make any objection to the proposed boundaries, so that the Secretary of State may not make improper boundaries, or form a district without due inquiry. It appears to me clear, therefore, that the Secretary of State had jurisdiction to grant this certificate; and the rule must be discharged.

MELLOR J. I am entirely of the same opinion. It might be expedient, if the whole of a salmon river were in one county, that the quarter sessions of the county should have entire control over the formation of the district. And after a district has been formed, if wholly in one county, the justices in sessions are, by s. 6, to appoint a board of conservators; and if in two or more counties, then, by s. 7, the conservators are to be appointed by the joint action of the quarter sessions of the several counties; and it is very reasonable that this joint power should be intrusted to the quarter sessions of the different counties; but it is very difficult to vest in any court of quarter sessions the formation of the district, and there might be still greater difficulty in obtaining the joint action of two counties; the formation of the district is accordingly left to the Secretary of State. Still the Secretary of State, while acting on the application of any particular county, is not to prejudice the rights of neighbouring counties without giving them the opportunity of being heard, by giving a month's previous notice; and if the limits were to be fixed by the quarter sessions, I do not see why they should not give the notice, and not the Secretary of State; but the object of the notice by the Secretary of State is, I presume, that if any person feels aggrieved by his property being included in the district, he may appeal to the discretion of the Secretary of State not to

1866

THE QUEEN v. SIR GEORGE GREY.

include him in that district. If this jurisdiction were not in the Secretary of State, but in the quarter sessions, one would have expected some such machinery as is to be found in the Highway Acts, as to the formation of highway districts, where one court of quarter sessions initiates the proceedings, which are of no validity until affirmed by subsequent sessions; but there is no such provision in the present statute. On these grounds, I am of opinion that this jurisdiction to form and declare the limits of any district, in the first instance, is in the Secretary of State, under sections 4 and 5, in the same way as under sections 19 and 20 he has the power to modify or alter districts already formed, after due notice.

LUSH, J. I am of the same opinion. I think the scheme of the statute is, that unless the justices of any county first determine that it is desirable that a salmon fishery district should be formed in their county, the Secretary of State has no jurisdiction. But when the justices have so determined, then it lies entirely in the discretion of the Secretary of State what extent of area shall be included in the district. The language of section 4 shews this; and the proviso in section 5, which requires a month's previous notice to be given, affords all persons interested the opportunity to be heard against the limits proposed. Section 4 says nothing about the limits of the district, but simply that the justices may apply to the Secretary of State to form a given river in their county into a fishery district, and then the Secretary of State, under sections 3, 4, and 5, may add any portion of the neighbouring sea coast, or any rivers in the same or neighbouring counties. It seems to me perfectly clear that the Secretary of State, and he alone, has jurisdiction to determine the limits of a river as a fishery district.

*Rule discharged.*

Attorneys for prosecution: *R. M. & F. Lowe.*

Attorneys for defendant: *Solicitors to the Treasury.*

FOSTER *v.* DODD AND ANOTHER. 1866

*April* 24.

*Burial Acts*, 20 & 21 *Vict. c.* 81, *s.* 23; 22 *Vict. c.* 1, *s.* 1—*Order in Council as to Burial Ground—Burial Ground unused at the time.*

Section 23 of the 20 & 21 Vict. c. 81 enacts that it shall be lawful for the Queen in Council, from time to time, to order such acts to be done by and under the directions of the churchwardens, or such other person as may have the care of any vaults or places of burial, for preventing them from becoming or continuing dangerous or injurious to the public health:—

*Held*, that the section applies only to those places of burial which are consecrated or conveyed irrevocably for the purposes of burial, or which were in the care of persons as places of burial at the time the act passed.

From the year 1679 till 1844 land was held by a corporation from time to time under long leases as a burial ground, and afterwards from year to year, till 1855. No burials took place after 1844; and in 1854 an Order in Council, under 15 & 16 Vict. c. 85, s. 2, was made that burials should be discontinued. In 1857, the freeholder demised the ground for ninety-nine years to S., who entered and put some rubbish on the land; in 1859, S. demised to the plaintiff for fifty years, and he entered upon the land. In the same year an Order in Council was made, under 20 & 21 Vict. c. 81, s. 23, directed to "the person having the care of the burial ground," and served on the plaintiff, to do certain acts. The plaintiff disregarded the order, and thereupon the Secretary of State made an order, under 22 Vict. c. 1, s. 1, on the churchwardens of the parish in which the ground was situate to do the acts: the churchwardens having entered in pursuance of the order:—

*Held*, that the sections did not apply, and that the orders were invalid, and the churchwardens therefore liable as trespassers.

DECLARATION. Trespass to land of the plaintiff.

Plea. Not guilty by statute. 7 Jac. 1, c. 5; 21 Jac. 1, c. 12, s. 3.

At the trial at the sittings for London, after Trinity Term, 1860, before Cockburn, C.J., a verdict was taken by consent for the plaintiff, subject to the opinion of the Court on a special case, the material parts of which were as follows:—The defendants were the churchwardens of the parish of St. Bride, and it was while they were churchwardens they committed the trespass complained of; the land is situate within that parish. King Edward VI., by charter, gave the palace of Bridewell, with its precinct, to the city of London, as a house for the committal and correction of vagabonds and other idle persons. From the year 1679, and till Lady-day, 1844, the Corporation of London, governors of Bridewell Hospital, held the land under leases granted to them from time to time by the freeholder for the

1866

FOSTER v. DODD.

time being, namely, Earl De la Warr and his predecessors, for the successive terms of 41 years, 41 years, 41 years, 21 years, and 21 years, at the annual rent of 35*l.*; the first lease was granted in 1679, and the last in 1823; and in the first the land was described as "all that piece or parcel of ground then lying waste on the west side of the said hospital of Bridewell, and parcel of the jointure of the Countess of Dorsett, and parcel of the demesne lands of the manor of Dorsett Court;" and in each of the subsequent leases the land was described as all that piece or parcel of ground now in the occupation of the governors of the hospital, and used as a burial place, and also as parcel of the demesne land of Dorsett Court; and in the last two of the leases a plan of the land is drawn in the margin, and the words "burial ground" written on the plans; and in all the leases, except the first, there was a reservation to the lessors of the use and benefit of the great drain or sewer lying under and running through the land, and emptying itself into the river Thames, with liberty to make and continue any small drains into the great drain, and the habendum in such leases except the first, that is to say, in the second and third, was to hold to the governors for the use and benefit of the said hospital; in the fourth of such leases "upon trust, nevertheless, and to and for the use and relief of the poor persons harboured and kept in the hospital of Bridewell;" and in the last, "for the use, nevertheless, of the poor persons harboured and kept in the hospital of Bridewell." The second and succeeding leases contained a covenant to surrender at the end of the term; also a covenant not to build on the premises demised; also a covenant to pay the rent and taxes, with a power of re-entry for the non-payment of rent; and the last of such leases contained a covenant not to assign the premises without a licence of the lessor.

The last of such leases expired at Lady-day 1844; from that time until Lady-day, 1855, the governors continued to hold the land under the freeholder as tenants from year to year. At Lady-day, 1855, such tenancy expired pursuant to a notice to quit given by the governors of the hospital to their landlord, the then Earl De la Warr, and they then delivered up possession of the land to him.

The land contained 1011 square yards, and may be divided into

two portions, one containing about 263 square yards, and the other 748 square yards.

The governors of Bridewell Hospital have always provided a chapel as part of the buildings of the hospital, and a chaplain, an ordained clergyman of the Church of England, who resided within the precinct; and during the whole time that the land was under lease to the governors of Bridewell Hospital down to Lady-day, 1844, the larger portion of the land was used in the first instance as a burial ground for the inmates of Bridewell Hospital who died there, being rogues and vagabonds, and other persons of indifferent characters, and afterwards occasionally for other persons, some inhabitants, and others not inhabitants of the precinct, as well as for the inmates of the hospital, and burials had always been conducted according to the ceremonies of the Church of England, but there is no record that the land had ever been consecrated. No burial has taken place in the larger portion of the land since the year 1844; there is no direct evidence that any burial ever took place in the smaller portion of the land, and within the time of living memory it has been used only as an airing ground for the inmates of the hospital, and for drying their linen. From Lady-day, 1855, until the granting of a lease to Mr. Soward, no part of the land was used for any purpose.

On the first of December, 1857, the freeholder, the present Earl De la Warr, by lease under seal, demised the land, together with several houses and premises near thereto, to Mr. Soward for the term of ninety-nine years from Michaelmas-day, 1857. On the 9th of June, 1859, Mr. Soward by lease under seal demised the land and other premises to the plaintiff for the term of 50 years from Midsummer, 1859. Before granting the lease to the plaintiff, Mr. Soward pulled down some of the houses adjoining the land which were old, and put the materials, consisting of old bricks, timber, lime, and rubbish, on the larger portion of the land; he also made an opening and fixed gates in the western wall of the land, which was the only entrance to the ground. The plaintiff entered on the land, and brought further materials for the purpose of making a hard surface over it, and building a shed.

On the 29th March, 1854, an Order in Council was made, under 15 & 16 Vict. c. 85, s. 2, that for the protection of public health,

1866

FOSTER v. DODD.

burials, amongst other places, in the precinct of Bridewell, should be discontinued. The land in question has been known for many years as the burial ground of the precinct of Bridewell.

On the 23rd July, 1859, the Secretary of State for the Home Department caused a notice to be served on the plaintiff, under 20 & 21 Vict. c. 81, stating that it was his intention to represent to Her Majesty in Council, that for the purpose of preventing the burial ground of the precinct of Bridewell from becoming or continuing dangerous or injurious to the public health, an order should be issued for the adoption of the following measures:—1. That the whole of the rubbish, building material, &c., which hath been deposited on the burial ground of the precinct of Bridewell be completely removed, under suitable supervision, care being taken not to disturb or damage the head and foot stones or tombs. 2. That the whole surface of the ground be levelled, with the exception of tombs and gravestones, and be covered with a layer of fresh earth of the thickness of at least a foot. 3. That the surface be sown with grass seed, and that the vegetation be maintained in a proper state, and the surface be never disturbed.

This notice was directed to the person or persons having the care of the burial ground of the precinct of Bridewell. On the 12th of August, 1859, an Order in Council was made to the same effect. This order was likewise directed to the person or persons having the care of the burial ground of the precinct of Bridewell.

The Bridewell precinct burial ground still remaining in the same state, the Government Inspector was instructed to inspect the burial ground, and report to the Home Secretary, pursuant to section 1 of the 22 Vict. c. 1, whether the acts ordered to be done by the Order in Council, dated 12th August, 1859, had been performed; he reported nothing had been done to carry out the order. On the 15th of September, 1859, the Home Secretary caused an order to be made, under 22 Vict. c. 1, s. 1, directed to the churchwardens of the parish of St. Bride, and which order was duly delivered to them, which, after reciting that certain acts which, by the Order in Council, dated 12th August, 1859, were ordered to be done by the direction of persons, other than the churchwardens, having the care of such burial grounds, had not been done and performed within a reasonable time, and according to the intent of the Order in

Council, authorized and directed the churchwardens of the parish of St. Bride, in which the burial ground is situate, forthwith to do or complete the acts in the order mentioned, or such of them as remained undone.

On the 5th of October, 1859, the defendants, as churchwardens of the parish of St. Bride, caused a notice to be served on the Earl De la Warr, Mr. Soward, and the plaintiff, to remove and take away from the burial ground all the rubbish, materials, and other things lying there within fourteen days, and that in default they should cause the rubbish, materials, and things to be sold, and that after the expiration of the period of fourteen days they should proceed to cause the Order in Council to be carried into effect. On the 24th of October, 1859, the defendants, in consequence of the Orders in Council not having been obeyed, caused the land to be entered, and the acts directed to be done to be performed; which are the trespasses complained of.

The question for the opinion of the Court was, whether the plaintiff is entitled to recover in the action.

*Mellish, Q.C.* (*H. Bullar* with him), for the plaintiff. The question is whether the order of the Secretary of State is valid, and this will depend upon whether the land in the possession of the plaintiff, and which it is conceded was once a burial ground, is a place of burial in the care of any person within the meaning of section 23 of 20 & 21 Vict. c. 81, which enacts that "it shall be lawful for her majesty, upon the representation of one of her majesty's principal Secretaries of State, by the advice of her Privy Council from time to time to order such acts to be done by and under the directions of the churchwardens or such other persons as may have the care of any vaults or places of burial, for preventing them from becoming or continuing dangerous or injurious to the public health; and every such Order in Council shall be published in the *London Gazette,* and such churchwardens or other persons shall do or cause to be done all acts ordered as aforesaid, and the expenses incurred in and about the doing thereof shall be paid out of the poor-rates of the parish: Provided always that no such representation shall be made until ten days' previous notice of the intention to make such representation shall have been given to the church-

1866

FOSTER v. DODD.

wardens or other persons, or one of the churchwardens or other persons, having the care of the vaults or places of burial to which the representation relates."

[BLACKBURN, J. The sentence in the first part of the section is imperfect; it is to order *such* acts to be done. To what acts does it refer?

LUSH, J. It may mean such acts as are necessary for the preservation of the public health, or such acts as the Secretary of State may think fit to be done.]

It certainly appears that something is omitted. Then comes the 22 Vict. c. 1, which by section 1 amends section 23 of the earlier act; s. 1 is as follows: "Where it appears to one of her majesty's principal Secretaries of State, on the representation of any person authorized by him to inspect any vaults or place of burial in relation to which an Order in Council has been issued under the 20 & 21 Vict. c. 81, that any acts, which by such order are ordered to be done by or under the direction of persons other than churchwardens having the care of such vaults or place of burial, are not done or performed within a reasonable time, and according to the intent of such Order in Council, it shall be lawful for such Secretary of State by writing under his hand to authorize and direct the churchwardens of the parish in which such vaults or place of burial may be situate forthwith to do or complete the acts in such Order in Council mentioned, or such of them as remain undone; and such order of the Secretary of State shall be obeyed by such churchwardens, and they and all persons acting under their direction, shall have the same power of entering and doing all such acts upon the premises to which the Order in Council relates as if the said acts had by the Order in Council been directed to be done by such churchwardens, and such vaults or place of burial had been under their care." Now, the land in question is not subject to any trust or servitude for the purpose of burial; neither does it appear that it was ever consecrated. The governors of Bridewell Hospital held the land in question on lease for a term of years, which was from time to time renewed. They never acquired the fee, and the clear inference is that the ordinary would never consecrate land which had not been devoted in fee as a burial ground. No doubt there may be a burial ground which has not

been consecrated, but in such a case the land would be conveyed to trustees and held by them for ever for the purposes of burials. Besides, the leases under which the governors of Bridewell held, contained covenants to deliver up the land at the end of the term, and the leases were liable to forfeiture for non-payment of rent. So that, independent of the acts with respect to interments, there is nothing to prevent Lord De la Warr from dealing with the land as he pleases. It is true he could do no act which would become a nuisance, but he is under no legal restraint as to the mode in which he may enjoy his land. He is the owner in fee, and he is at liberty to lease it for ninety-nine years as he has done. The last lease granted to the governors of Bridewell expired in 1844. That lease was not renewed, but they continued to hold the land as tenants from year to year until 1855, when they delivered up possession to the freeholder. No burial had taken place there since 1844. Looking at these facts the inference is that it never was intended to use the land again as a burial ground. The 15 & 16 Vict. c. 85, s. 2, empowers the Secretary of State, for the protection of the public health, to order the discontinuance of burials in any part of the metropolis or in any burial grounds or places of burial in the metropolis; section 3 exempts the burial grounds of Quakers and persons of the Jewish persuasion, and of private persons, unless expressly named in the order. Section 4 makes it a misdemeanour to permit a burial to take place after an order has issued. Section 9 enacts that no new cemetery shall be provided or used without the approval of the Secretary of State. So that under these sections the Secretary of State has power to order that no more burials shall take place in any burial ground, and that no new burial ground shall be made in the city of London. Section 8 of 18 & 19 Vict. c. 128, empowers the Secretary of State to appoint persons to inspect any burial ground or cemetery, parochial or non-parochial, or place for the reception of bodies, to ascertain the state and condition thereof, and where regulations in relation thereto may have been made to ascertain whether they have been observed, and if any person having the care of any such burial ground or cemetery, or other place, shall obstruct any inspector, he shall be subject to a penalty. This section applies to burial grounds which are for ever devoted to purposes of burial; and so do all the

1866

FOSTER v. DODD.

acts which relate to the regulation of a burial ground after it has been closed. The main object of these acts is the protection of public health. It is very possible that where a consecrated burial ground or land conveyed to trustees to be used for ever as a burial ground is closed, it would, because it was no longer profitable, become neglected, and it would be very beneficial as regards public health that the Secretary of State should have power to make orders regulating the care of those grounds, and it may be right that the expenses should be paid out of poor-rates. The freehold in those grounds would be in the rector, or incumbent, or trustees; but where the freehold of a place which is situate in London, and which was once a private burial ground, is in a private individual, it is not likely he would suffer a valuable property to become a nuisance, and after some time has elapsed and it cannot become injurious to public health, there is no reason why he should not use it for other purposes; and there is no power to order, where land held on lease was used as a burial ground and was afterwards delivered up to the freeholder, that the freeholder shall be for ever prevented from making any use of it, but that it shall be planted out and kept as an open space for the benefit of the neighbourhood. Section 24 of the 20 & 21 Vict. c. 81, enacts that in all cases in which unconsecrated land or buildings are vested in trustees for the purposes of a cemetery or burial ground, and burials in such cemetery or burial ground shall, by Order in Council, have been discontinued with the sanction of the Secretary of State, it shall be lawful for the trustees to lease or sell any part in which no interments had taken place. If section 23 was intended to apply to ground the absolute property of a private individual, he would have been included in this section. There is no power given to a private person to lease or sell a portion of his land, and a private person would be worse off than one who had a trust for ever.

[LUSH, J. The private person would not require the sanction of the Secretary of State to sell part of the land which has never been used. He would only be restrained in Chancery from interfering with the tombs and land of those who had purchased graves or vaults: *Moreland* v. *Richardson*. (1)]

(1) 26 L. J. (Ch.) 690; 24 Beav. 33.

That may be so. But looking at the words of section 23, that the acts ordered to be done are to be done by the churchwardens, or persons who are in a position similar to churchwardens; it must have been the intention of the legislature that that section should apply only to places which were to be kept for ever as burial places. Here the other side must contend that the plaintiff is a person who has the care of a place of burial, which he is not. If the legislature intended to include the present case, it might very easily have been done by the use of apt words, such as "by the direction of the owners of burial grounds," or "of persons in whom such burial grounds are vested." This cannot be said to be a place of burial in the custody of a churchwarden, or of a person who had the care of it as a place of burial before the act passed. The Secretary of State has exceeded his jurisdiction, and the order is therefore bad.

*Bovill, Q.C.* (*R. Clarke* with him), for the defendants. By s. 30 of the 20 & 21 Vict. c. 81, that act, and the 15 & 16 Vict. c. 85, are to be read as one act. Now section 2 of the latter act empowers the Secretary of State to order a discontinuance of burials in all burial grounds consecrated or unconsecrated, public or private; this is clear from section 3, which includes the burial grounds of Quakers and Jews and of private persons, if expressly named in the order. The fact that the land in question is not subject to any trust for the purpose of burials, cannot make any difference if it be a private burial ground. Take the case of an hospital which has a private burial ground attached to it, looking at the mischief which the acts are intended to prevent, and the object to be effected—the protection of the public health —what reason is there for saying that such a burial ground is to be excluded from the jurisdiction of the Secretary of State? Suppose the owner in fee of a burial ground were to allow interments to take place in his land, and he was under no obligation to continue it as a burial ground, could it be said that it would not come under the cognizance of the Secretary of State, and that he could neither order it to be closed, nor afterwards make any order respecting it with a view to prevent its becoming injurious to the public health? if so, the object of the legislature in passing these acts would be defeated. If the

1866

FOSTER v. DODD.

15 & 16 Vict. c. 85, empowers the Secretary of State to prohibit burials in all burial grounds, the language of section 23 is large enough to enable him to make an order ordering such acts to be done as will prevent the burial ground from becoming injurious to the public health. It is just as necessary he should do so in the case of a private as of a public burial ground. Here the Secretary of State has made such an order—he is the sole judge of what is right to be done. The order is good on the face of it, and the churchwardens to whom it is addressed are bound to obey it; it would be going very far to hold that the person who is to execute the order, and who is somewhat in the position of a sheriff who has to execute a warrant, is to be held liable for acting under it. The Secretary of State has decided for the protection of the public health it is necessary that certain things should be done; if he has wrongfully exceeded his jurisdiction, perhaps the remedy is by criminal information, but the order is a protection to the defendants.

*Mellish, Q.C.*, was heard in reply.

BLACKBURN, J. The question in this case turns on the construction of section 23 of the 20 & 21 Vict. c. 81; that section enacts that it shall be lawful for the Queen in Council from time to time to order *such* acts to be done by or under the directions of the churchwardens, or such other persons as may have the care of any vaults or places of burial for preventing them from becoming or continuing dangerous or injurious to the public health. We must leave out of our consideration the word "such," because it has no correlative; but the power is limited to directing churchwardens or other persons having the care of places of burial to do what is necessary to prevent those places from becoming dangerous to the public health. On the argument, it was urged on behalf of the defendants, that if this land had been once a place of burial, that was sufficient to give jurisdiction under this section, so that no matter how long ago the burials took place, such a place was a place of burial within section 23; but the argument would go the length that the pest fields in Marylebone, which are now built over, were within the jurisdiction conferred by this section, although no Secretary of State, if there was the power, would advise

its exercise in such a manner as to order the streets and squares to be levelled, and the open space to be planted. I think we cannot give any such extensive meaning to these words. The directions are to be given to those "who have the care of any vaults or places of burial," that means those who have the care of such places *as* vaults or places of burial, whether they must have the care of them at the time the order was made it is not necessary to determine, but they must have the care of them *as* places of burial at the time the act passed. I do not mean to say that the section is limited to those cases where actual burials are going on at the time the act passed; for instance, if land was conveyed to trustees to hold as a burial ground, or the owner of land had dedicated it to the purpose of burials, or there was land used as a parochial churchyard which was consecrated, all these would be within the section, although burials in them had ceased, but still they may be fairly said to be places of burial in the care of some person as places of burial. The order in question, however, seems to have been applied to a place that had ceased to be a burial place before the act passed. The corporation, who were the managers of Bridewell, had a lease of this land when it was waste ground; and at that time the corporation buried those who died in the prison in this leasehold land; after they had used it as a burial ground, in the leases subsequently granted it was called "burial ground," and therefore the lessor must be taken to have given his consent to persons being buried there, and he could not object to it: but in 1844 the last lease expired, and I do not find there is anything that shews that there was any intention on the part of the lessor that it should be renewed. From 1844 the corporation continued tenants from year to year, and in the year 1855, two years before the 20 & 21 Vict. c. 81 was passed, they surrendered the lease to Lord De la Warr, the owner in fee, and there is nothing to shew that it was the intention of Lord De la Warr that it ever should be dedicated as a place of burial in future. The common law would not permit him to create a nuisance injurious to the public health, nor would it allow any indecent interference with the bodies of the dead. To that extent he would be restrained. The powers under the 23rd section are limited to the prevention of those things which are injurious or dangerous to health, and the

1866

FOSTER v. DODD.

legislature never intended that by their exercise a man should be deprived in perpetuity of a valuable freehold, and that it should for ever remain an open space for the benefit of the neighbourhood. The ground on which I base my judgment is that the order of the Secretary of State is invalid, and does not protect the defendants, as the land in question, although it had once been, had ceased to be a place of burial, and was not at the time the Order in Council was made, or when the act of parliament was passed, a place which was in the care of any person as a place of burial.

SHEE, J. I am of the same opinion. The defendants in this case are sued as trespassers, and their acts were trespasses unless they can be justified under an order of the Secretary of State made under section 23 of 20 & 21 Vict. c. 81, and section 1 of 22 Vict. c. 1. The facts appear to be these:—For many years previously to 1857 the land in question had been held by the governors of Bridewell Hospital. Their leases expired in the year 1844, and the governors continued in possession until 1855 as tenants from year to year; but from the time when it no longer suited the governors of the hospital to hold the land on lease, that is, from 1844, all burials had ceased in the land in question. In 1857, the freeholder, Lord De la Warr, granted a lease for ninety-nine years to Mr. Soward, and Mr. Soward entered on the land, and made some alterations. He pulled down some houses included in his lease, made openings in the wall at the western boundary of the land, and fixed gates there, through which was the only entrance to the land. Having done this, he, in 1859, demised the land for fifty years to the plaintiff, and the plaintiff took possession under the demise, and covered the land with timber, bricks, and lime, with the intention of erecting a shed near it; so that there having been no burials in the land after the year 1844, it had, previously to the making of the Order in Council (the validity of which is in question), been completely converted from the purposes for which it had been used for the convenience of the governors of Bridewell Hospital, that is, as a place of burial, and appropriated to purposes entirely different. There is nothing to shew that the freeholder—who was released from all engagements to the governors of Bridewell Hospital by the expiration of their lease

in 1844, and the subsequent tenancies which determined in 1855— was precluded from dealing with the land in the same way as he was entitled to deal with any other land he might be possessed of. Under these circumstances, the land having ceased to be used as a burial place, we have to consider whether the Secretary of State had the power, under section 23 of the 20 & 21 Vict. c. 81, and section 1 of the 22 Vict. c. 1, to issue the order, in obedience to which the defendants committed the acts of trespass of which the plaintiff complains. By section 23, the Queen in Council may order "acts to be done by the churchwardens, or such other persons as may have the care of any vaults or places of burial." What is the meaning of these words? In my opinion they apply only to vaults and places in the care of persons for the purpose of burial, that is, in the care of persons appropriating them, at the time the act passed, to the purpose of burial. It is quite clear, as it seems to me, on the facts of this case, that the land in question was not a place at that time in the care of any one for the purpose of burial. There was no one, properly speaking, who had the care of it, for that purpose, or any other. It was in the possession of its owner, the person holding it under a lease from the freeholder, who was the absolute owner of it. The words of the 23rd section "any person having the care of any places of burial" are not satisfied by the relation in which the plaintiff stood to the land at the time the Order in Council of the 12th of August was made, and I therefore think, that in making the order of the 15th of September the Secretary of State exceeded the powers conferred on him, and that those who acted under it were trespassers.

LUSH, J. I am of opinion that the order of the Secretary of State was in excess of the authority given to him by the statute, and is void, and therefore does not justify the acts done under it. The piece of land in question had been used, during the time it was on lease to the governors of Bridewell Hospital, for the purpose of burial of persons who died in the hospital, and it was only leased to them for certain periods. From the year 1844 to the time the Order in Council was made, the burials had ceased and there is no evidence of their ever having taken place since. The land was then surrendered to the freeholder, and again

1866

FOSTER v. DODD.

leased out by him for ninety-nine years. If the Order in Council be good, then the owner of the land would be for ever prevented from making use of that land in any way whatever. It would be a harsh interpretation to put on a statute, passed for sanitary purposes on public grounds, so to construe it as to deprive the owners of the benefit of their land. I am of opinion, looking at the terms of section 23 of the 20 & 21 Vict. c. 81, that it relates only to those burial places that may be called public burial grounds, or rather public burial places that still retain the character of burial places, and which have been devoted by consecration or conveyed in trust for the purposes of burial. That is the description of burial place, in my opinion, to which this section refers. The words of the section are, "from time to time to order such acts to be done by or under the direction of the churchwardens or such other persons as have the care of any vaults or places of burial, for preventing them from becoming or continuing dangerous or injurious to the public health." I think those words, "having the care of any vaults or places of burial," point to the description of burial place which is devoted and appropriated irrevocably to that particular purpose, either by consecration or otherwise, and which is to be for ever used for that purpose. I agree with Mr. Bovill that the Secretary of State has authority to prohibit burials in any place, whether public or private; but section 23 does not apply to land in the hands of an owner, which he has a right to use for any purpose he chooses. For these reasons I think our judgment ought to be for the plaintiff.

*Judgment for the plaintiff.*

Attorneys for plaintiff: *Miller & Sons.*
Attorney for defendants: *Edmunds.*

SMITH, APPELLANT; REDDING, RESPONDENT.

1866
*May* 4.

*Beer-house—Hours for keeping open—"Parish or place"—3 & 4 Vict. c. 61, s. 15.*

The 3 & 4 Vict. c. 61, s. 15, enacts that no person licensed to sell beer or cider by retail shall keep his house open for the sale of it after eleven at night within any city, cinque port, town corporate, parish, or place, having a population exceeding 2500, nor after ten elsewhere. By the interpretation clause "parish or place" includes hamlet.

The appellant's house was within a hamlet having less than 2500 inhabitants, but the parish to which the hamlet belonged had more than that number:—

*Held*, that the appellant had the privilege of keeping his house open till eleven: for though the hamlet might be a "place" within the statute, the house was still within "a parish" with a population of more than 2500.

CASE stated by justices of Staffordshire under the 20 & 21 Vict. c. 43.

At a petty sessions holden at Shenstone, an information was preferred by the respondent against the appellant, under section 15 of the 3 & 4 Vict. c. 61, charging that he on the 13th January last, at the hamlet of Wall, being then a beer-house keeper, and duly licensed to sell beer, ale, and porter by retail, to be drunk and consumed in his house and premises there situate, unlawfully did keep open his said house and premises for the sale of beer after the hour of ten o'clock at night, to wit, at thirty minutes past ten o'clock at night of the same day, the said hamlet of Wall and the said house and premises not being (inter alia) within a parish or place the population of which, according to the last parliamentary census, exceeds 2500 persons.

Upon the hearing it was proved that on the day alleged in the information the appellant was a beer-house keeper in the hamlet of Wall, in the parish of St. Michael, Lichfield, and was duly licensed to sell beer, ale, and porter by retail, to be drunk and consumed in his house and premises there.

On the day in question, at half-past ten p.m., the respondent, who is a police-constable, visited the appellant's house, and found it open for the sale of beer, there being four men drinking in it.

Wall is a hamlet or place maintaining its own poor, and has its own overseers and guardians, but is within the Lichfield Poor Law Union. The population of Wall, according to the last parliamentary

1866

SMITH v. REDDING.

census, was ninety-four, but the population of the parish of Saint Michael, within which it is situate, exceeds 2500 persons. The hamlet of Wall, like several other places maintaining their own poor within the parish of Saint Michael, Lichfield, has now a separate church and minister, and is duly constituted the district chapelry of Saint John, Wall.

It was contended, on the part of the appellant, that Wall was within and formed part of a parish the population of which exceeded 2500 persons.

The justices being of opinion that the evidence brought the case within the operation of the 15th section of the 3 & 4 Vict. c. 61, and that Wall is "a place" of itself within the meaning of that act, convicted the appellant.

The question for the opinion of the Court was, whether the hamlet of Wall is part of the parish of Saint Michael within the meaning of section 15 of the 3 & 4 Vict. c. 61, so as to confer upon the appellant the privilege of keeping his house open after ten till eleven o'clock at night. (1)

*Matthews*, for the respondent. The conviction was right. Wall is "a place" of itself within the meaning of the 3 & 4 Vict. c. 61, s. 15. The decision of Erle, J., in *Reg.* v. *Charlesworth* (2), in the Bail Court, is directly in point.

[LUSH, J. The house is not to be kept open after ten "elsewhere;" to shew that the house is "elsewhere" it must be proved to be neither within a parish nor place having a population of 2500; here it is within such a parish.]

The 11 Geo. 4 & 1 Wm. 4, c. 64, is incorporated with the 3 & 4 Vict. c. 61, and by section 32 of the former act "The words 'parish

5 QB 393.

(1) The 3 & 4 Vict. c. 61, s. 15, enacts:—"That no person licensed to sell beer or cider by retail shall have or keep open his house for the sale of beer or cider, nor shall sell or retail beer or cider, nor shall suffer any beer or cider to be drunk or consumed in his house, at any time before five in the morning nor after twelve at night of any day in the week, in the cities of London and Westminster, or within the boundaries of any the boroughs of Marylebone, Finsbury, the Tower Hamlets, Lambeth, or Southwark, nor after eleven within any parish or place within the bills of mortality, or within any city, cinque port, town corporate, parish, or place, the population of which, according to the last parliamentary census, shall exceed 2500 . . . nor after ten in the evening elsewhere."

(2) 20 L. J. (M.C.) 181.

or place' shall be deemed to include any township, hamlet, tithing, vill, extra-parochial place, or any place maintaining its own poor." Reading section 15 of the later act with section 32, hamlet must be inserted instead of "parish or place," and the appellant's house is within a hamlet having less than 2500 inhabitants.

*Anstie*, for the appellant. The true construction has been pointed out by Lush, J.; and that is expressly confirmed by the case of *Scott* v. *Washington* (1), in which the Court dissented from the previous decision of Erle, J., in *Reg.* v. *Charlesworth.* (2) In *Scott* v. *Washington* (1) the appellant's house was situate in an aggregation of houses, the population there being less than 2500, but the population of the parish at large was above that number; and the Court held that the appellant's house was within a "parish" of the requisite population, and so had the privilege of the later hour. The appellant's house may be within a "place" having less than 2500 inhabitants, but it is also within a parish having more than that number.

BLACKBURN, J. I am of opinion that the magistrates were wrong in convicting the appellant, inasmuch as his beer-house was situate in the parish of St. Michael; and it was therefore in one sense within a parish having more than 2500 inhabitants. The conviction was under section 15 of the 3 & 4 Vict. c. 61; but before looking at that section it will be as well to refer to section 1, which provides that no licence shall be granted to a house which is not rated to the poor-rates of the parish, township, or place in which it is situate, at an annual value of 15*l.*, if situate in the cities of London or Westminster, or within any parish or place within the bills of mortality, or within any city, cinque port, town corporate, parish or place having a population above 10,000; or if within any city, &c., having a population not exceeding 10,000 but exceeding 2500, the rate must be on the value of 11*l.*; and elsewhere on 8*l.* That section clearly contemplates a house being rated to one parish or place, and yet that it shall be within another place having a population of 2500. However small the parish may be, yet if it is within a cinque port, or other larger district, the rate must be on the

(1) 13 W. R. 939. (2) 20 L. J. (M. C.) 181.

1866

SMITH v. REDDING.

higher scale to allow of a licence being granted; so if the rating were to a smaller township within a larger parish. It is therefore plain that the legislature contemplated that a "place" to which the house is rated might be within another "place" of the description referred to in section 15. Now under section 15 a house may be situate in a small parish or place and yet be within a city, cinque port, &c.; and in that case it must have the privilege of the later hour of keeping open; and I do not see why we are to take away the privilege if the house be in a small township and yet within a larger parish. The appellant's house, therefore, being within the parish of St. Michael, the appellant had the privilege of a beer-house keeper within a parish with a population above 2500. It is not necessary to express any opinion as to whether the case of *Reg.* v. *Charlesworth* (1) is right or wrong; the decision may well stand with our present judgment; nor is *Scott* v. *Washington* (2) necessarily inconsistent with *Reg.* v. *Charlesworth* (1), it may well be that if a collection of houses has acquired a distinct name it may be a "place" within the meaning of the statute, and yet it would be within a parish. In the present case Wall may be a place within the meaning of the statute, yet the appellant's house is certainly within the parish of St. Michael, which has a sufficient population to give the house the privilege he claims. It may be doubtful whether our decision is carrying out the intention of the legislature, but we can only interpret the meaning from the terms used.

SHEE, J. I am of the same opinion. The appellant could not be properly convicted unless he kept open his house after ten in a place not being within a parish having a population exceeding 2500. The interpretation clause, s. 32 of 11 Geo. 4 & 1 Wm. 4, c. 64, says, "The words 'parish or place'"—i.e., those words conjointly—"shall be deemed to include any township, hamlet, tithing, vill, extra-parochial place, or any place maintaining its own poor," It is clear that Wall is a place which satisfies two of these designations or descriptions, but the fact that the appellant's house is within Wall does not take away the privilege which is given to it from its being within the parish of St. Michael, the population of which exceeds 2500.

(1) 20 L. J. (M. C.) 181. (2) 13 W. R. 939.

1866

SMITH v. REDDING.

LUSH, J. I am of the same opinion. The object of this part of the act was to regulate the time of closing according to the supposed wants of the district, as estimated by the amount of population. Having regard to that object, what is the meaning of the word "place"? It may be a place of many thousand inhabitants, popularly called a town, made up of several parishes or parts of parishes; and such a place is, I think, a "place" within the meaning of the act: and this is the definition of place given by Erle, J., in *Reg.* v. *Charlesworth* (1); and the keeper of a beer-house within the area of the town might well keep open his house to the later hour, although the particular parish in which it was situate had less than the required population. On the other hand if the house be not within a place of 2500 inhabitants, but yet is within a parish with that population, being within the parish it comes directly within the privilege. *Scott* v. *Washington* (2) is therefore perfectly consistent with *Reg.* v. *Charlesworth.* (1) In *Scott* v. *Washington* (2) the house was situate in a part of a parish where there was an aggregation of houses, and the population of that part was under 2500, but the parish contained a larger population, and it was held, as we hold now, that the house, being within a parish of the requisite population, had the privilege. In order to sustain a conviction for keeping a beer-house open after ten p.m., it must be shewn that the house is neither within a place nor within a parish containing 2500 inhabitants. The interpretation clause, s. 32. of 11 Geo. 4 & 1 Wm. 4, c. 64, says that "The words 'parish or place,' shall be deemed to include township, hamlet, &c.," not that "parish and place" shall be restricted to these meanings.

*Judgment for the appellant.* (3)

Attorneys for appellant: *Loftus, Vizard & Co.*

Attorneys for respondent: *White & Sons.*

(1) 20 L. J. (M. C.) 181.

(2) 13 W. R. 939.

(3) *Windsor*, Appellant; *Jeffery*, Respondent. Q. B., T. T. 1866. June 6. This was a similar conviction. The appellant's house was situate in the parish of St. Mary-in-the-Castle, the population of which is 4800; the parish is partly within and partly without the borough of Hastings, the population of the part without the borough, in which part the appellant's house was situate, being less than 2500.

*Bayford* appeared in support of the conviction. *Anstie*, contrà.

The Court (Blackburn, Mellor, and Shee, JJ.) quashed the conviction on the authority of the principal case.

[IN THE EXCHEQUER CHAMBER.]

1866
*May* 10.

## BRAMWELL v. EGLINTON.

*Bankrupt—Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134)—*Adjudication of pauper prisoner under s.* 99, *Relation of, under s.* 103.

Section 103 of the Bankruptcy Act, 1861,—which enacts that every adjudication against any prisoner for debt so brought up as aforesaid shall, unless the Court shall otherwise direct, have relation back to the date of his commitment or detention,—has reference to a prisoner for debt "brought up" before the county court, and adjudged bankrupt, upon his own petition in formâ pauperis, under sections 98, 99.

As the adjudication is to have relation back to the commitment absolutely, and not merely as an act of bankruptcy, a bonâ fide dealing with the bankrupt after the commitment is void, and cannot be protected by section 133 of the Bankruptcy Act, 1849.

Therefore, where goods were assigned by S. to the defendant, but S. remained in possession of them up to his arrest under a ca. sa., and after his commitment to gaol the defendant took possession of the goods, and S. was afterwards adjudged a bankrupt on his own petition in formâ pauperis under ss. 98, 99 of the Bankruptcy Act, 1861:—

*Held*, that the goods passed to S.'s assignee under section 125 of the Bankruptcy Act, 1849, as in his order and disposition with the consent of the true owner; and that the defendant could not avail himself of the protection of section 133.

Appeal from the decision of the Court of Queen's Bench, discharging a rule to enter a verdict for the defendant or a nonsuit. (1)

The action was by the plaintiff as official assignee of one C. G. Service, a bankrupt.

The first count alleged a conversion by the defendant, before Service became bankrupt, of goods belonging to Service. The second count alleged a conversion, after Service became bankrupt, of goods belonging to the plaintiff as his assignee.

Pleas. First, not guilty. Second and third, to the first and second counts respectively, a traverse of the property in the goods as alleged in those counts respectively. Issue thereon.

The cause was tried before Mellor, J., at the Durham summer assizes, 1863, when the following facts were proved:—The plaintiff

(1) See the report of the case in the court below, 33 L. J. (Q.B.) 130; 5 B. & S. 39.

is the official assignee of one C. G. Service, a bankrupt. On the 22nd of October, 1862, Service, who was a shipbroker, having borrowed various sums of the defendant to the amount of 50*l.*, gave him a bill of sale of the goods claimed by the plaintiff in this action, which were household furniture.

The bill of sale was an indenture of the 22nd of October, 1862, between Service and the defendant, but not executed by the later, and was an absolute assignment from Service to the defendant, of the household furniture as scheduled, in consideration of 50*l.* paid by the defendant to Service; with a proviso, "that if Service, his executors, &c., shall upon demand, by notice in writing to be given by the defendant, his executors, &c., or left at his or their last place of abode in England, well and truly pay, or cause to be paid, to the defendant, &c., the said sum of 50*l.*, and shall, in the meantime pay interest on the 50*l.*, at 5*l.* per cent. per annum, by equal half yearly payments, and also a proportionate sum for any portion of a half year, between the last half yearly day of payment, and the giving of the notice, these presents shall cease and be void." There was a covenant by Service to pay the 50*l.* and interest accordingly; and in default of payment contrary to the above proviso, "then at any time thereafter" it was to be lawful for the defendant to take possession of and sell the goods, holding any surplus, after payment of the 50*l.* interest and expenses, in trust for Service; and it was declared and agreed that until default, Service was to retain quiet possession of the goods.

This bill of sale was duly registered.

Service remained in possession of the furniture, it being that of the house in which he and his wife lived, till the 12th of February, 1863. On that day Service was arrested on a ca. sa. at the suit of a creditor for 33*l.* 10*s.* He immediately informed the defendant of the fact of his arrest, and was advised by him to go to gaol, and petition the court in formâ pauperis, as he afterwards did. Service was lodged in Durham gaol on the same day, of which the defendant had notice. On the 16th of February, about noon, the defendant, knowing Service was in gaol, left a notice in writing with Mrs. Service, at their house, demanding payment of the money secured by the bill of sale; and the same evening he took possession of the furniture by putting a person in

1866

BRAMWELL v. EGLINTON.

the house, and afterwards by a friendly arrangement with Mrs. Service, he locked the house up.

On the 18th of February, Service filed his petition in formâ pauperis (together with the proper affidavits) for an adjudication of bankruptcy against himself, in the county court of Durham, under section 98 of the Bankruptcy Act, 1861; and on the 23rd of February, he was brought up to the county court, under the 99th section, and adjudged a bankrupt, protection being granted, and an order being made for his discharge from custody. He was discharged accordingly, and on his return home the same day, Service first received actual notice of the defendant's demand for payment.

No creditors' assignee was appointed after the adjudication, and the plaintiff, being the registrar of the court, became and remained official assignee, and, as such, demanded the furniture of the defendant. The defendant, however, retained possession, and on the 13th March, he sold it. On the 8th June, this action was commenced, and on the 15th June, an order for the sale of the furniture was made by the county court judge, under the 125th section of 12 & 13 Vict. c. 106.

On the trial it was contended on the part of the plaintiff, that Service, having petitioned the court in formâ pauperis, and having, after being brought up before the county court judge for adjudication upon such petition, been duly adjudged a bankrupt by the judge, under the 99th section of the act of 1861, the adjudication related back to the 12th February, the date of his commitment to prison, by virtue of the 103rd section, and that the goods having been in the order and disposition of Service on that day, with the consent of the defendant as the true owner, the property therein passed, by relation, on that day to the plaintiff as official assignee.

For the defendant it was contended that the adjudication of bankruptcy against pauper petitioners did not, by virtue of the 103rd section, relate back to the date of their commitment to prison; that the operation of the 103rd section was confined to cases of recusant or contumacious prisoners within the 102nd section; and that as there was no evidence that the bankrupt had brought himself within the 102nd section, or been adjudged a bankrupt under it, the 103rd section had no application to his

case. It was also further contended on the part of the defendant, that even on the assumption that the 103rd section did apply to the cases of bankrupts who had done no more than petition the court in formâ pauperis, and been thereupon adjudged bankrupt, still the seizure of the goods, having been made by the defendant on the 15th February without notice of any prior act of bankruptcy committed by Service at the time of such seizure, and having preceded the date of the petition on the 18th and the date of the adjudication on the 23rd February, was a protected transaction within the 133rd section of the Bankruptcy Consolidation Act, 1849.

The learned judge reserved leave to the defendant to move upon these points, amongst others, to enter a nonsuit or a verdict for the defendant; and a verdict was entered for the plaintiff, subject to the leave reserved. A rule having been obtained accordingly, the Court of Queen's Bench, on 22nd February, 1864, discharged it. (1)

May 9. *E. James, Q.C.* (*Lewers* with him), for the defendant. The question is, whether the adjudication on the 23rd February has relation to the commitment on the 12th, and if so in what way. First, section 103 (2) has no reference to the adjudication

(1) See the report of the case in the court below, 33 L. J. (Q.B.) 130; 5 B. & S. 39.

(2) The following sections of the 24 & 25 Vict. c. 134, are material:—

"As to adjudication of bankruptcy against pauper and other prisoners for debt:

"s. 98. If any debtor, whether a trader or not, now being, or who shall be imprisoned for any debt or demand, shall through poverty be unable to petition the proper court for an adjudication of bankruptcy against himself, he shall be at liberty to petition in formâ pauperis, upon making an affidavit that he has not the means of paying the fees and expenses usually payable in respect of a petition by a debtor for an adjudication of bankruptcy. Such affidavit may be sworn before the gaoler of the prison where such debtor is confined, and such gaoler is hereby empowered and required to take such affidavit, and swear the deponent thereto without fee or reward.

"s. 99. Every person so petitioning in formâ pauperis as aforesaid shall, if not previously discharged by a registrar, be brought up to the county court of the district, at its next sitting after the presentation of such petition, and shall be examined by the court touching his estate and effects, debts, dealings, and transactions; and if the court shall be satisfied with such examination, it shall make an order of adjudication of bankruptcy against the petitioner, and, if it think fit, grant an order of protection to the petitioner."

By s. 100, The gaoler of every prison in England or Wales is to make a monthly return of all the prisoners in his custody for debt to the London

1866

BRAMWELL v. EGLINTON.

under section 99; but is a penal enactment having reference to contumacious prisoners under section 102, the section immediately preceding. The relative position of the sections is strongly in favour of this. Again, the ordinary act of bankruptcy of this kind is lying in prison for fourteen days, under ss. 71 and 101;

court, the district court of bankruptcy, or the county court, having jurisdiction in bankruptcy, within the jurisdiction of which the gaol is situate, as the case may be.

"s. 101. The commissioner, or county court judge, as the case may be, shall in every case, on receiving such return, make an order that a registrar of the court of bankruptcy, or of the county court of the district in which the gaol is situate, shall attend at the gaol on a day to be named, being at least seven and not more than twenty-one days from the date of such return. Notice of such order shall be forthwith given to the gaoler, and also to the execution and detaining creditors of every prisoner included in such return. On the day named in the order, the registrar shall attend at the prison, and examine every prisoner included in such return who shall have been in prison, being a trader, for fourteen days, or not being a trader, for two calendar months, touching his estate and effects, debts, dealings and transactions; the registrar shall also ascertain the last place of abode and business of each such prisoner within six months next prior to his imprisonment. The registrar shall have power to make an order of adjudication in bankruptcy against every such prisoner, and to grant him protection, and to make an order for his release from prison; and shall also direct in what court such adjudication shall be prosecuted, having regard to the amount of debts and the place of trade and residence of the prisoner within six months next preceding his imprisonment. The registrar shall certify the particulars of each case to the court of which he is registrar.

"s. 102. If the prisoner shall refuse to appear, or to be sworn, or to answer all lawful questions of such registrar, or of the execution or detaining creditor, or of any other creditor who shall be present, respecting his debts, liabilities, dealings, and transactions, or to make a full discovery of his estate and effects, and of all his books of account, or to produce the same, or to sign his examination when taken, the registrar shall report the same to the court, and the court may, by warrant under the hand and seal of the judge or commissioner, commit him to the common gaol of the county, there to be kept with or without hard labour, for any time not exceeding one month, and the court may at the same time adjudge such prisoner bankrupt; provided that if after such adjudication, the bankrupt shall, before the period of such commitment has expired, submit to be examined, and in all things conform to the jurisdiction of the court, he shall have in all respects the same benefit as if he had submitted to the court in the first instance.

"s. 103. Every adjudication against any prisoner for debt so brought up as aforesaid shall, unless the court shall otherwise direct, have relation back to the date of his commitment or detention, as the case may be, and shall be as valid and effectual for all purposes as if it had been made under any other of the provisions of this act."

and if the 103rd section is to be held to apply, as the court below directed, to a prisoner adjudged a bankrupt under s. 99, the anomaly will ensue of two different effects to an adjudication, according as the prisoner happens to be discharged by the court or registrar.

[BRAMWELL, B. The Court of Queen's Bench held that s. 103 applied to s. 99, but they left undecided whether it might not also apply to s. 101.]

The words "so brought up as aforesaid," may well apply to cases under s. 102, as under that section a contumacious prisoner may be imprisoned with hard labour, and it is but natural to infer that he must be brought up to the court before he would be thus committed.

Secondly, assuming s. 103 to apply to the present case, still the defendant is entitled to a verdict, for he took possession of his goods before the adjudication, and such a transaction is within the protection of s. 133 of the Bankruptcy Act, 1849: *Graham* v. *Furber*. (1)

[ERLE, C.J. There is the difficulty in my mind that the defendant had notice that the bankrupt was in prison before he took possession of the goods.]

He had no notice of the act of bankruptcy, which was the filing the petition, as under s. 86. And this is the view the Court below were disposed to take, had it not been for the peculiar wording of s. 103; but if the adjudication is to be considered as made on the first day of the imprisonment, then the adjudication is *before* the act of bankruptcy on which it is founded, and never was such a thing heard of.

May 10. The Court desired counsel for the plaintiff to confine his argument to the second point.

*Mellish, Q.C.*, for the plaintiff. Section 103 makes the adjudication relate back to the first day of the commitment absolutely, and not as an act of bankruptcy. There is nothing extraordinary in such an enactment. It is to be remembered that the distinction between bankruptcy and insolvency is abolished by the act of 1861. And this part of the act (sections 98 to 105) relates to the bankruptcy of pauper and other prisoners for debt. By

(1) 14 C. B. 134; 23 L. J. (C.P.) 10.

1866

BRAMWELL v. EGLINTON.

section 57 (now repealed) of 1 & 2 Vict. s. 110, if any prisoner had goods in his order and disposition as reputed owner with the consent of the true owner *at the time of his arrest or other commencement of his imprisonment*, the goods became vested from that date in the assignee under the order of the Insolvent Court; and there was no exception, corresponding to section 133 of the Bankruptcy Act, 1849, in favour of persons having bonâ fide dealings with the insolvent between the arrest and petition. Sections 58 and 59 had a similar tendency. So that the effect given by the court below to section 103 is no more than existed previously under the insolvency statutes. There is a fallacy in the argument that section 103 was intended to inflict punishment on contumacious prisoners under the previous section 102; it is a matter of indifference to the bankrupt to whom his property passes, whether to the particular creditor or the creditors at large.

The Court then called upon

*Lewers*, in reply, on the second point. If these sections from section 98 to 105 are to be treated as a distinct code relating to pauper prisoners alone, the argument for the plaintiff might be unanswerable; but that is not so, s. 101 is not confined to pauper prisoners. The question of notice may therefore be material, and notice of the commitment only is not sufficient, as it might or might not result in bankruptcy. *Edwards* v. *Gabriel* (1), in the Exchequer Chamber, shews the distinction between a positive act of bankruptcy made so by enactment, and an act of bankruptcy by relation. Wightman, J., expressly points out the distinction; so in *Conway* v. *Nall.* (2) Tindal, C.J., says: "The meaning of notice of a prior act of bankruptcy appears to me to be, that the party, in order to defeat an execution, shall have notice of a prior act of bankruptcy complete in itself at the time the notice is given to him."

ERLE, C.J. We affirm the judgment of the court below on both points. On the first point, we think that section 103 applies to a prisoner brought up as in the present case. Section 98 and the sections that follow relate to "pauper and other prisoners for debt," and section 103 goes back, as far as applicable, to the

(1) 31 L. J. (Ex.) 113; 7 H. & N. 520, see p. 522.

(2) 1 C. B. at p. 649; 14 L. J. (C.P.) at p. 167.

class of bankrupts in the previous sections of what may be called and treated as a separate and distinct chapter of the statute. Section 103, therefore, clearly applies to a prisoner "brought up" to the county court under section 99; and it is unnecessary for the present purpose to say whether it would also apply to a prisoner adjudged a bankrupt and discharged by the registrar under section 101.

Secondly, the transaction in question took place after the debtor's imprisonment began and before the actual adjudication, that is, between the first day of the imprisonment and the time when the debtor was adjudged a bankrupt the defendant took possession of his goods; and the second question is, whether or not the transaction was protected under section 133 of the Bankruptcy Act, 1849. The question of notice,—how far the knowledge which the defendant had would have interfered with the protection, if the transaction had been otherwise within section 133,—is unnecessary to consider in the view we take. The difficulty in my mind vanished the moment Mr. Mellish pointed out that, by the act of 1861, the codes as to insolvency and bankruptcy were blended into one; because it may well be that the legislature intended to apply some of the principles peculiar to insolvency to this particular class of bankrupts, and by section 103 to make the operation of the adjudication as complete as if the debtor had been adjudged a bankrupt on the first day of the imprisonment: thus giving to a bankruptcy under this part of the statute the effect which an insolvency had under section 57 of 1 & 2 Vict. c. 110, by which goods in the order and disposition of an insolvent prisoner at the time of his arrest or other commencement of his imprisonment, as reputed owner, with the consent of the true owner, became vested in the assignee from the time of the arrest. (1) Section 103 says, "every adjudication against any prisoner so brought up as aforesaid shall have relation back to the date of his commitment," that is, the adjudication must have its full operation on the first day of the imprisonment, and consequently what occurred after that

(1) This point is also fully noticed in the judgment of the Queen's Bench; see 5 B. & S. at pp. 51—3; 33 L. J. (Q.B.), at pp. 134—5.

1866

BRAMWELL v. EGLINTON.

day can have no more effect than if it occurred after adjudication.

POLLOCK, C.B., BRAMWELL, B., and KEATING, J., concurred.

*Judgment affirmed.*

Attorney for plaintiff: *W. L Harle.*
Attorney for defendant: *R. Walthew.*

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*May 9.*

[IN THE EXCHEQUER CHAMBER.]

## LLOYD *v.* HARRISON.

*Debtor and Creditor—Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134), *ss.* 192, 198—*Certificate of Registration of Deed of Assignment—Protection to Sheriff—Escape.*

The production of a certificate, valid on its face, of the registration of a deed of assignment, under s. 192 of the Bankruptcy Act, 1861, by a debtor for the benefit of his creditors, justifies the sheriff, under s. 198, in releasing the debtor whom he has arrested on a ca. sa. at the suit of a creditor, although the deed be in fact invalid as between the debtor and non-assenting creditors.

ERROR from the judgment of the Court of Queen's Bench in favour of the defendant on demurrer to a plea. (1)

The declaration alleged in substance that the plaintiff, on the 17th of December, 1862, recovered judgment against W. Baird in the Court of Exchequer, and sued out a ca. sa. directed to the sheriff of Montgomeryshire; that the sheriff had previously died, and the defendant being his under-sheriff continued in office pursuant to 3 Geo. 1, c. 15. That W. Baird made a deed bearing date 16th of December, 1862. [The deed was set out at length, and by it W. Baird assigned all his personal estate to trustees for the benefit of such of his creditors as should execute or assent to it. (2)] That after the writ of ca. sa. was delivered to the defendant for execution, viz., on the 26th of December, 1862, the deed was duly registered, and a certificate of registration given under the Bankruptcy Act, 1861, s. 193. That the writ was delivered on

(1) See 6 B. & S. 36; 34 L. J. (Q.B.) 97.

(2) It was admitted by counsel for the defendant that the deed could not be supported after the decision in *Ilderton v. Castrique*, 14 C. B. (N.S.) 99; 32 L. J. (C.P.) 206, and other cases.

the 23rd of December, 1862, to the defendant to execute, and that he arrested Baird on the 2nd of January, 1863, and suffered him to escape on the production to the defendant of the certificate of the registration of the deed, which was not a deed and certificate within the meaning of s. 198 of the Bankruptcy Act, 1861, and the other sections relating thereto, and did not entitle Baird to protection from arrest within the said sections. That the defendant thus voluntarily allowed Baird to escape, and made a false return that Baird was entitled to protection under the Bankruptcy Act, 1861. That the plaintiff did not assent to or execute the deed.

Plea. That the defendant suffered and permitted Baird to depart out of his custody, and afterwards made such return to the writ as alleged, upon and by reason of the production by Baird of such certificate as in the declaration mentioned, which is in the words and figures following:—"The Bankruptcy Act, 1861. Certificate of registration of deed and protection to debtor. I, William Whitehead, Esquire, being the chief registrar of her Majesty's Court of Bankruptcy, do certify that on the 26th day of December, 1862, a certain deed or instrument bearing date the 16th day of December, 1862, and made and executed by and between William Baird, of the first part, Abraham Howell and John Hodgson (trustees) of the second part, and the several other persons whose names and seals are set and subscribed to the said deed being creditors of the said W. Baird of the third part, being a deed or instrument of assignment of goods, household furniture, and all other the personal estate and effects of the said W. Baird, to the said trustees for the equal benefit of the creditors of the said W. Baird, was on the 26th day of December, 1862, and at the hour of three of the clock in the afternoon, on such day brought into my office for registration, and was duly filed and registered pursuant to the provisions of the Bankruptcy Act, 1861. Given under my hand and seal of the Court at the Court of Bankruptcy, London, the 1st day of January, 1863. (L.S.) Richard Bethell, registrar, acting for the chief registrar. Note.—This certificate is available to the said W. Baird for all purposes as a protection in bankruptcy." The plea then alleged that before such arrest and detention all the conditions, to be observed according to the

1866

LLOYD v. HARRISON.

statute in order to make the deed valid and effectual and binding on all the creditors of Baird as if they were parties to and had duly executed the same, had been observed, and notice of the filing and registration of the deed had been given as in and by the statute required and provided, and that the plaintiff before and at the time of the date and execution of the deed was a creditor of Baird within the meaning of the statute in respect of the debt for which the judgment was recovered.

Demurrer and joinder.

On this demurrer judgment was given by the Court of Queen's Bench in favour of the defendant; Crompton, Mellor, and Shee, JJ., being of opinion that the sheriff was justified under s. 198 of 24 & 25 Vict. c. 134 (1), in discharging the debtor on the production of the certificate, although the deed was in fact invalid as between the debtor and non-assenting creditors; Cockburn, C.J., being of a contrary opinion. (2)

*Baylis*, for the plaintiff. It is conceded on the part of the defendant that the deed was invalid under the Bankruptcy Act, 1861. The certificate therefore was no protection to the debtor under section 198, and the defendant was not justified in releasing him. In *Ilderton* v. *Jewell* (3) the certificate of an invalid deed was held no protection to bail, as it had been previously held in *Ilderton* v. *Castrique* (4) no protection to the debtor; and in the former case Erle, C.J. (5), said the certificate was as void as the deed itself.

[ERLE, C.J. That was as between the debtor and the creditor; but the question now is, whether the certificate is absolutely void, so as to afford no protection to the sheriff.]

(1) 24 & 25 Vict. c. 134, s. 198. "After notice of the filing and registration of such deed has been given as aforesaid, no execution, sequestration, or other process against the debtor's property in respect of any debt, and no process against his person in respect of any debt (other than such process by writ or warrant, as may be had against a debtor about to depart out of England) shall be available to any creditor or claimant without leave of the court; and a certificate of the filing and registration of such deed under the hand of the chief registrar and the seal of the court shall be available to the debtor for all purposes as a protection in bankruptcy."

(2) See 6 B. & S. 36; 34 L. J. (Q.B.) 97.

(3) 14 C. B. (N.S.) 665; 32 L. J. (C.P.) 256: affirmed in Ex. Ch. 16 C. B. (N.S.) 142; 33 L. J. (C.P.) 148.

(4) 14 C. B. (N.S.) 99; 32 L. J. (C.P.) 206.

(5) See 14 C. B. (N.S.) at p. 675.

In order to be good in favour of the debtor and bail as against the creditor, the certificate must be of a valid deed; but it would be strange if, although bail were still liable and bound to render the debtor, the sheriff could immediately discharge him. The debtor may apply to the Court of Bankruptcy to be discharged out of custody: *Re Windsor* (1); or to the court out of which execution issued, and the court can examine into the validity of the deed, and will refuse to discharge him if it turn out invalid: *Dewhurst* v. *Kershaw* (2); *Leigh* v. *Pendlebury* (3); or if the deed be valid, if the debt for which the debtor is arrested was contracted after the execution of the deed, as was decided in the Common Pleas in *Phillips* v. *Poland* (4), and afterwards by the Lords Justices in *Re Poland.* (5) But in all those instances, if the sheriff is bound to act on the certificate, he would have let the debtor go, and the debtor would have been wrongly discharged. It is said that the certificate is binding, as being a judicial act of the registrar, but what the registrar does under section 193 is simply ministerial. *Thomas* v. *Hudson* (6), *Norton* v. *Walker* (7), *Saffery* v. *Jones* (8), are only authorities for the defendant on the principle of the *Marshalsea* case (9), that the instrument affording the protection is a judicial act of a tribunal having jurisdiction in the matter. Throughout the sections referring to the registration the words "such deed" are used, which mean a deed valid under section 192; so that this certificate being merely the act of a ministerial officer, and not the certificate of "such deed," as the deed is invalid, is mere waste paper. Cockburn, C.J., in the court below, considered the argument founded on "such deed" as unanswerable.

[BRAMWELL, B. I am not so pressed by that verbal argument. If the certificate on the face of it be a certificate of a valid deed, though the deed be not so in fact, yet it is the certificate of "such deed," if that means the certificate of a valid deed.]

(1) 1 New Rep. 230.
(2) 1 H. & C. 726; 32 L. J. (Ex.) 146.
(3) 15 C. B. (N.S.) 815; 33 L. J. (C.P.) 172.
(4) Law Rep. 1 C. P. 204.
(5) Law Rep. 1 Ch. Ap. 356.
(6) 14 M. & W. 353.
(7) 3 Ex. 480.
(8) 2 B. & Ad. 598.
(9) 10 Rep. 68.

1866

LLOYD v. HARRISON.

Stress has been laid on the 12 & 13 Vict. c. 106, ss. 112, 113, corresponding to the 6 Geo. 4, c. 16, s. 117, and the 5 Geo. 2, c. 30, s. 5, under which, by order of the court, protection for a limited period is given to a bankrupt, with penalties of 5*l.* a day on an officer detaining him after the production of "such" protection; but the cases are very different.

[BRAMWELL, B. The analogy is very much in favour of the defendant. The order of the court was always a good protection, although the bankruptcy was voidable by reason of the insufficiency of the petitioning creditor's debt, or from the supposed bankrupt not being a trader, or some other such reason.]

The present is not a limited protection. Again, no penalties are imposed on the officer under section 198.

[BRAMWELL, B. It may be a protection, although no penalties are imposed on the officer if he does not regard it.]

Under s. 113 of the act of 1849, it is "such protection," that is the order itself, which the officer is bound to obey; in s. 198, it is the certificate of "such deed" only, and not the certificate itself, which is to afford the protection. If the legislature had intended the certificate purporting to be a certificate of a valid deed to be sufficient, they would have said so. Again, the reason why the order for protection in bankruptcy should afford the bankrupt a right to his immediate discharge, is because his property is all vested in his assignees; whereas in a composition deed under the present act there need be no cessio bonorum; and that is the very reason why the sheriff should not act on the certificate. For suppose the deed fictitious, a creditor having obtained execution, the sheriff arrests the debtor just as he is going abroad and is met by the certificate, the creditor may lose 10,000*l.* and the defendant escape with it on his person. There is no anomaly in holding that the debtor is entitled to be discharged if the deed is really valid, and yet that the sheriff is not bound to act on the certificate, but to keep him in custody until the order for his discharge is obtained; for if this right to protection be a mere privilege no action will lie against the sheriff: *Magnay* v. *Burt* (1); the only course is for the debtor to apply for his discharge. But even if there is hardship on the sheriff that

(1) 5 Q. B. 381.

is no argument: *Bateman* v. *Farnsworth* (1); *Haythorn* v. *Bush.* (2) Again, it is said that by section 198 as long as the certificate remains (and it is doubtful whether it can be set aside) execution should not be taken out without leave of the court; but that section only applies to the case of the certificate of a valid deed, giving a discretion in the court to allow arrest in certain cases, notwithstanding the deed, as under s. 112 of the act of 1849: *Ex parte Stuart.* (3) It was also said the plaintiff ought to have got the certificate set aside. But to what court is he to apply, to the Court of Bankruptcy? But the defendant's counsel in the court below failed to shew that the Court of Bankruptcy would have any jurisdiction in the case of an invalid deed; and at all events in the meantime the debtor might abscond.

*Mellish, Q.C.* (*G. Bruce* with him), for the defendant. The certificate in the present case is a certificate of "such deed," for it is a certificate of a valid deed on the face of it, though in effect it misdescribes the deed. What is the duty of the officer on the production of such a certificate? It is said for the plaintiff, to keep the debtor in custody until it can be ascertained whether the deed which the certificate says is good is in fact valid. But if so, what is the use of the certificate at all? and the latter part of section 198 would be absolutely useless. The whole object is to prevent imprisonment as much as possible, and therefore that the debtor should be out of prison while the parties are litigating whether or not the deed is good. If the certificate had followed the terms of the deed, it may be the sheriff would have been bound to treat it as a nullity; and though it would be hard, still possibly the officer would be bound to know the law and that such a deed had been held invalid; but when a certificate shewing on the face of it a good deed is produced, the officer has no alternative given him but to act upon it and discharge the debtor at once. Whatever difference there may be between the two things, the legislature has said in positive terms the effect shall be the same; the certificate is to be available as a protection in bankruptcy.

[BRAMWELL, B. It is to be observed that the section does not

(1) 29 L. J. (Ex.) 365.

(2) 2 Dowl. 641.

(3) 33 L. J. (Bkr.) 4.

1866

LLOYD v. HARRISON.

say as a certificate of conformity, but as a protection in bankruptcy.]

It is said the act of the registrar in granting the certificate is not judicial: but he must have a certain judicial discretion not to register and grant a certificate of what he knows to be an invalid or fictitious deed, as if he knows the affidavits are false. Other sections shew this, particularly section 193; the registrar ought to cast his eye over the deed, and ought to describe it in his certificate by a faithful abstract. It is impossible to put the argument in favour of the view of the majority of the Court below more forcibly than in the judgment of Crompton, J., where he says: "My judgment proceeds on the ground that the legislature appears to me to have pointed out the document in question as the one on which the sheriff is to act, at all events until he has notice of the invalidity of the deed; and I think him excused by the legislature directing him not to persist in executing the process if such document be produced, just as he is where the plaintiff himself has directed him not to execute the process. I cannot construe the act of the legislature as imposing so monstrous a hardship upon the sheriff as to direct him under severe penalties to act upon the production of the document, and yet to leave him liable in so acting as for a breach of duty, if it should turn out that circumstances of which he can have no knowledge have made invalid the deed on which the certificate is founded. The legislature throws upon the registrar, the officer of the court, the responsibility of seeing that the requisite proportion of creditors have signed, and he has the affidavit before him of that fact, and he has also the deed before him from which he is to make in his book of registry a short statement of the nature and effect of the deed. The sheriff, being required to act merely on the production and having a copy of the certificate of the registration, has no means of testing its validity, either in point of fact or law. The legislature would be putting him in a worse case than in the ordinary case of difficulty of a sheriff who can inquire, and whose duty it was in many cases at common law to inquire, into the validity of documents. Here the legislature in effect takes from him all opportunity of inquiry, and directs what is his duty on production and receipt of a copy of the certificate. It seems to me that the legislature have said

that the document in question is to be evidence that 'such' valid deed has been duly executed, upon which the sheriff is required to act; and that in effect he is prevented by the legislature from inquiring further, and is compelled to act at once upon such evidence, at all events, unless he has some knowledge or notification of the badness of the deed. I think, therefore, that we ought to hold that the sheriff in the case at bar was justified in discharging the debtor who produced the certificate of the registrar in due form that such deed had been executed, although the deed afterwards turned out to be invalid." (1) If there is any doubt about the validity of the deed, the creditor can avoid all risk by getting leave of the Court of Bankruptcy to issue execution: *Re Tresidder*. (2) In that case the Lord Chancellor said: "Suppose a creditor wants to take out execution, it is said he may proceed at law at his own peril; but I think it not unreasonable that he should set the law in motion without incurring the great peril of doing it at his own risk."

*Baylis* was heard in reply.

ERLE, C.J. We are of opinion that the judgment must be affirmed. This matter has been discussed with remarkable research, and very powerful reasons are given by the Lord Chief Justice in the court below in favour of his view, as well as by the other judges with whose opinion we concur. By the 198th section *the certificate* of such deed is to operate as a protection in bankruptcy, so that the sheriff is not to go and ascertain whether the certificate is true and there is a valid deed, but is to act at once upon the production of the certificate. The words of the section give some operation to the certificate; and the certificate would be without any operation if the production of it were not sufficient. Some stress was laid on the fact that it is only the certificate of *such* deed which is to operate as a protection, that is, a certificate of a valid deed; but this on the face of it is a certificate of a valid deed, and so is a certificate of "such deed." The protection given to the debtor is not a mere privilege, but a right to be at once discharged, as in the case of a protection in bankruptcy; and

(1) See 6 B. & S. at pp. 80—81; 34 L. J. (Q.B.) at p. 110.
(2) Law Rep. 1 Ch. Ap. at p. 24.

1866

LLOYD v. HARRISON.

whether or not the sheriff would be liable to the penalty of 5*l.* for every day he detained the debtor in his custody, it is not necessary to inquire; at all events, he is justified in discharging the debtor. The judgment of the Court below is affirmed for the reasons given in the several judgments of the puisne judges, all of which are well worthy attention; but out of respect to the memory of the late Mr. Justice Crompton we refer more particularly, as the ground of our judgment, to the passage from his judgment which Mr. Mellish cited at length. (1)

POLLOCK, C.B., BRAMWELL and PIGOTT, BB., BYLES and KEATING, JJ., concurred.

*Judgment affirmed.*

Attorneys for plaintiff: *Poole & Hughes.*
Attorneys for defendant: *N. C. & C. Milne.*

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*May* 10.

[IN THE EXCHEQUER CHAMBER.]

MOODY *v.* CORBETT AND OTHERS, AND THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.

*Railway—Superfluous Lands—Lands Clauses Consolidation Act*, 1845 (8 *Vict.* *c.* 18), *s.* 127—*Vested Interest not divested by subsequent Statute.*

3 Ex 285-7
4 HL 614
2 HL (Sc + D) 162.
7 QB 373-5, 383-4
8 QB 4
7 HL 287

By provisions in a railway act (similar to section 127 of the Lands Clauses Consolidation Act, 1845), lands acquired by the company under the act, but not required for the purposes of the act, were to be sold within ten years of the passing of the act; and superfluous lands remaining unsold at the expiration of the time limited, were "thereupon to vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same":—

*Held*, 1, that this extended to lands the reversion of which had been acquired by the company subject to a term. 2. That, where there are several adjoining properties in contact with the superfluous land, it is to be divided among the owners of the adjoining properties in proportion to the frontage of each: meaning by frontage what would be the length of the line of contact of each property if the line were made straight from the point of intersection of the boundaries on one side to the point of intersection of the boundaries on the other side.

By a subsequent act obtained by the same company, the periods limited by the several acts relating to the company for the sale of their superfluous lands were

(1) Ante, p. 508.

extended to five years from the passing of the last act, and the several acts were to be read as if that period had been fixed by each of those acts :—

*Held*, that this enactment did not defeat a right to unsold superfluous land already vested under a former act at the time of the passing of the last act.

1866

MOODY *v.* CORBETT.

ERROR from the judgment of the Court of Queen's Bench in favour of the plaintiff on a special case. (1)

This was an action of ejectment brought to recover a piece of land containing 4A. 0R. 34P., or thereabouts, and situate near to a bridge over the London, Brighton, and South Coast Railway at Croydon, called Pitlake Bridge, and on the east side of and adjoining the highroad leading from Croydon to Mitcham, bounded on the west by the said highroad, on the north by land of the plaintiff, on the east by land now or lately belonging to Messrs. Thomas and James Turner, and on the south by the London, Brighton, and South Coast Railway, with the messuages or tenements and buildings standing thereon, and in the respective occupations of the defendants, Corbett, Walker, and Haworth.

The cause was tried before Williams, J., at the Surrey summer assizes, 1861, when a verdict was entered for the plaintiff, with leave to the defendants to move to enter a nonsuit if the Court of Queen's Bench should think that there was no evidence to go to the jury in support of the plaintiff's case ; and a rule having been obtained accordingly, a special case was subsequently agreed to.

The following are the parts of the case material to the judgment (2) :

The plaintiff is trustee of a marriage settlement of the 5th June, 1844, by which the legal estate in the lands which are coloured green in the accompanying plan marked No. 1 (p. 516), of which Mrs. Hawkins was the owner in fee, was conveyed in fee to the plaintiff.

The defendants, the London, Brighton, and South Coast Railway Company, appeared and defended for the whole, as did also the other defendants, Corbett, Walker, Haworth, and Wright, who were severally occupiers of the lands and buildings sought to be recovered in the present action, the lands being coloured pink on

(1) See 5 B. & S. 859; 34 L. J. (Q.B.) 166.

(2) The case as stated at length may be found in 5 B. & S. 859; and 34 L. J. (Q.B.) 166.

1866

MOODY v. CORBETT.

the plan, and the buildings thereon being shaded, and they severally derive their title through the railway company.

The plaintiff, as owner of the adjoining lands marked green on the plan No. 1 (p. 516), under the sections 216 and 217 of 7 & 8 Vict. c. xcii. (passed 29th July, 1844), intituled "An Act for making a railway from the London and Croydon Railway at Croydon to Epsom," sought to recover possession of the lands and buildings, as being superfluous lands, adjoining the plaintiff's, unsold within the prescribed period of ten years after the passing of the act, and therefore forfeited to the plaintiff as such adjoining owner.

By the 5 Wm. 4, c. 10, the London and Croydon Railway Company was incorporated for the purpose of making a railway from Croydon to join the London and Greenwich Railway near London. By the 7 & 8 Vict. c. xcii., the Croydon and Epsom Railway Company was incorporated for the purpose of making a railway from the London and Croydon Railway at Croydon to Epsom.

By s. 131 of 7 & 8 Vict. c. xcii., the company were empowered to agree with the owners of the lands which they were authorized to enter into and take for the purposes of the railway for the absolute purchase of any such lands or such parts thereof as they should think proper, and of all subsisting leases, all charges, mortgages, &c., affecting any such lands.

By s. 216 it is enacted, "For the purpose of making provision respecting the sale of lands acquired by the company under the provisions of this act, but which shall not be required for the purposes thereof, that the company shall sell all such superfluous lands in such manner as they may deem most advantageous, and convey the same to the purchasers thereof by deed under the common seal of the company, and such sales and conveyances shall take place within ten years after the passing of this act."

By s. 217, "If the company do not sell such superfluous lands within the period aforesaid, then *such lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same.*" (1)

(1) The words in italics are identical with the terms of s. 127 of the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18).

By ss. 227, 228, 230, 231, 234, the company were authorized to make the line as delineated on the plan deposited (No. 2) and book of reference, or within the limits of deviation, and to take the whole or such of the lands delineated and described as should be necessary within such limits. The land coloured pink on the plan No. 1 (p. 516), as well as part of the plaintiff's land, was within the limits of deviation.

By the 7 & 8 Vict. c. xcii. (6th August, 1844), the powers of the London and Croydon Railway Company were extended, and by s. 26 power was given to them to purchase the Croydon and Epsom Railway.

By the 9 & 10 Vict. c. cclxxxiii. (27th July, 1846), reciting the above acts amongst others, and that in pursuance of the 7 & 8 Vict. c. xcvii., the London and Croydon Railway Company had purchased the Croydon and Epsom line, the London, Brighton, and South Coast Railway Company, the defendants, were incorporated; and by ss. 1 and 5 the London and Croydon and Croydon and Epsom companies were dissolved, and the powers, privileges, rights, lands, &c., granted to them were vested in the London, Brighton, and South Coast Railway Company. By section 1 the regulations and restrictions in the acts of the dissolved companies were made binding on the London, Brighton, and South Coast Railway Company.

Evidence was given at the trial that the London and Croydon Railway Company purchased of the owner, Wood, under the powers of their act, all the land coloured pink on plan No. 1 (p. 516) (except Nos. 61, 62, 63, and the triangular piece marked A), and the fee was conveyed to them. As to A, no evidence of ownership or occupation appeared to have been given. The following evidence was also given:

Giles Long proved that he knew the land adjoining and close to Pitlake Bridge on the Croydon and Epsom line of railway. The land marked green on the plan No. 1 (p. 516), represented the part he then held as yearly tenant under Mrs. Ainsworth, formerly Hawkins; and had held for rather more than twenty-one years. The adjoining property, coloured pink, was in the occupation of Samuel Harris for many years before the making of the railway, and after him it was occupied by Mr. Wright, and after

1866

MOODY v. CORBETT.

Mr. Wright the defendant Corbett occupied one of two cottages (originally forming one house) thereon, and another person occupied the other cottage. There was a kitchen garden, flower garden, and fishpond belonging to the house occupied by defendant Corbett, and about three and a half acres of meadow land, of a part of which Corbett has been in occupation about four years, and up to the present time. That there is at the west end a piece of land between the ground in question and the road bank which is used as a road from the Croydon parish road to his house and the property occupied by Corbett and others. That after passing Corbett's premises there is a vacant piece of ground, formerly part of the said old parish road, and running down to and stopped many years ago by the railway; it has become grassed over, and the part near the railway was used as a woodyard by Morley, and afterwards by West.

Thomas West proved that he rented a portion of the land coloured pink, consisting of a house with a cottage attached, with meadow and garden, and had done so for thirteen years next prior to Christmas, 1860 (but not the cottage and lands Nos. 61, 62, and 63, which were occupied by Morley), under an agreement which was not produced, and that he underlet the house, meadow, and garden land to a man named Wright, who underlet to the defendant Corbett, and that he underlet the cottage attached to another person. That when he first went there the railway was being made, but was not finished. He proved further, that during all that time he paid his rent to the London, Brighton, and South Coast Railway Company.

John Morley proved that he occupied one of the cottages and the rest of the property on plan No. 1 (p. 516), and which adjoins Wood's property, being Nos. 61, 62, and 63, under leases from the owner, Wright, for twenty-one years, from 1836 to 1857. That he paid rent to Wright during such period, until the making of the railway, and after that to Henry Anscombe on behalf of the London, Brighton, and South Coast Railway Company, and continued to do so to the end of the term.

Henry Anscombe, superintendent at the London, Brighton, and South Coast Railway terminus, and formerly travelling inspector of such company, proved the receipt of rent from the two last

witnesses, West and Morley, for their holdings during the last four or five years, and the payment of it to the London, Brighton, and South Coast Railway Company.

1866

MOODY v. CORBETT.

George Robinson proved that he had been a servant for ten years of the London, Brighton, and South Coast Railway Company, and that he occupied the cottage formerly let to the witness Morley, and had done so for two years. He took the cottage from one Brown, who was in the said company's employ, and that his rent for such cottage was deducted by the London, Brighton, and South Coast Railway Company from his wages every fortnight. He added that the nature of his employment did not render it convenient that he should occupy that cottage more than any other.

It was proved at the trial, that after the determination of Morley's lease, the London, Brighton, and South Coast Railway Company was duly rated for the house so occupied by Robinson, and that they paid the rates.

Evidence was also given that the London, Brighton, and South Coast Railway Company, in June, 1859, put up to auction amongst other lots, the land in question, as surplus property.

On the 21st July, 1863, the 26 & 27 Vict. c. cxcii., an act giving further powers to the London, Brighton, and South Coast Railway Company, was passed; and by s. 28 "the respective periods by the several acts relating to the company limited for the sale of their superfluous lands are hereby respectively extended for five years from the passing of this act, and those several acts shall be read and construed as if that period had been fixed by each of those acts for that purpose."

The question for the opinion of the Court was, whether the plaintiff is entitled to recover all or any part, and if any, what portion of the lands coloured pink on plan No. 1 (p. 516).

The Court was to have power to draw all inferences of fact which a jury might draw.

The Court of Queen's Bench gave judgment for the plaintiff (1), holding, first, that ss. 216, 217, of 7 & 8 Vict. c. xcii., extended to lands of which the company had acquired the reversion, subject to existing tenancies; secondly, that s. 28 of 26 & 27 Vict. c. cxcii.,

(1) See 5 B. & S. at p. 876; 34 L. J. (Q.B.) at p. 172.

1866

MOODY v. CORBETT.

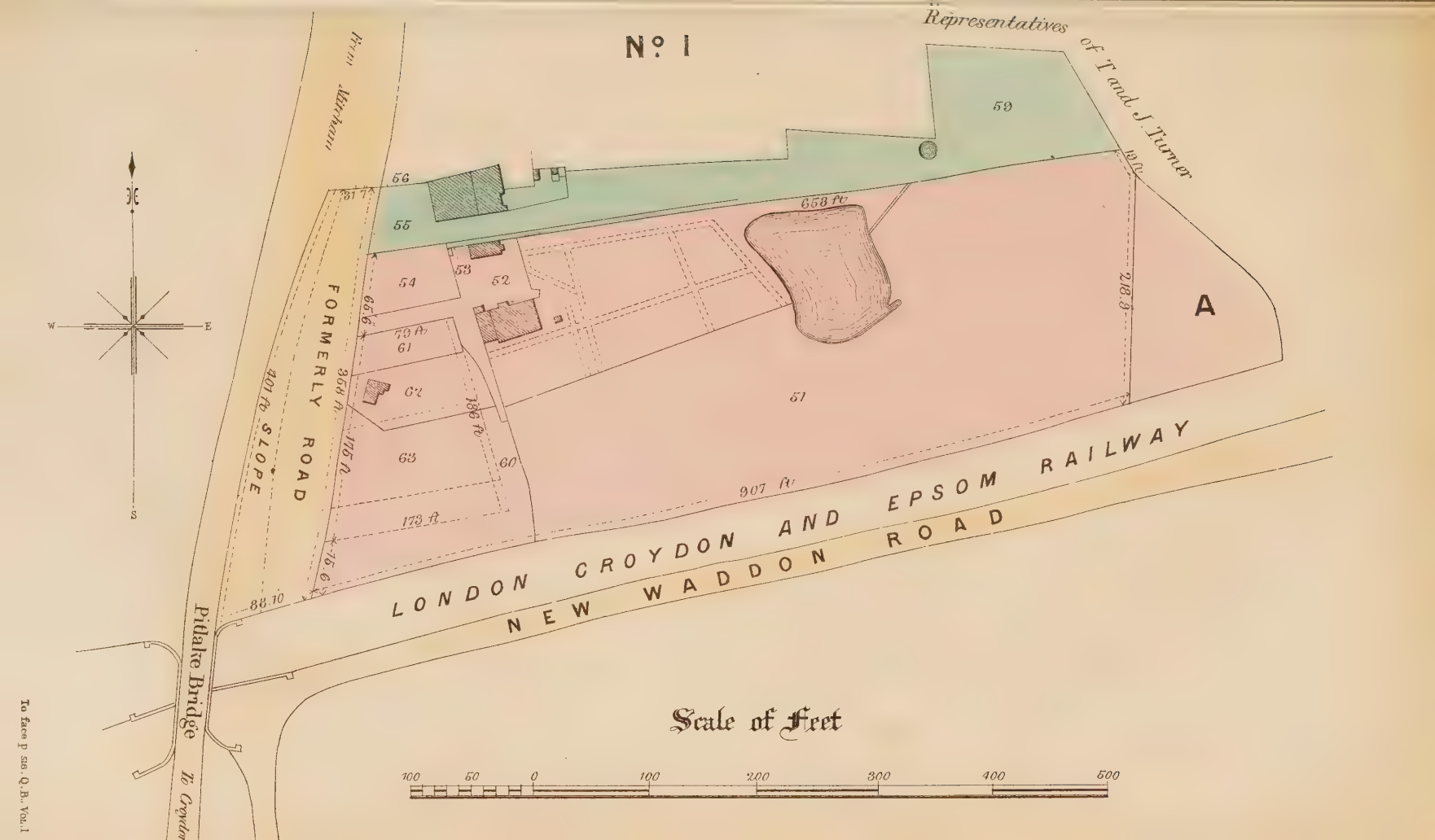
did not extend to periods of limitation which were no longer running at the time the act passed, so as to divest a right which had already vested; thirdly, that the surplus land was to be treated as one property, in ascertaining who were "adjoining owners," and the mode of division between the adjoining owners was by drawing a line from the point where the boundaries of two adjoining owners meet to the nearest point of land used for the purposes of the railway. (1)

Feb. 2. *Bovill, Q.C.* (*Hannen* with him), for the defendants. The claimant must make out his title to particular land: *Doe* v. *King*. (2) Now even on the assumption that the mode of measuring given by the Court below is correct, the acreage or frontage of Turner's land is not given, nor even the ownership of that coloured brown, though a road must belong to some one. If the verdict is uncertain or ambiguous, it is unsufficient: Co. Litt. 227 a. Secondly, as to the lands marked 61, 62, 63, being under lease, the company had no power to take them until the leases fell in, and therefore the limitation of ten years cannot apply to them as land acquired by the company, which must mean acquired immediately. Thirdly, the 26 & 27 Vict. c. cxcii. s. 28, though passed in 1863, is a bar to the plaintiff's title. The 7 & 8 Vict. c. xcii. s. 116, must be read as if the time limited were till the year 1868. The very object of the clause was to divest vested rights. Lastly, the mode of apportioning the surplus lands directed by

(1) The following was the formal judgment entered:—

The Court is of opinion that the claimant was and still is entitled to the possession of all the land in the plan No. 1 hereunto annexed, and coloured pink, at the west end thereof, and at the east end thereof to a straight line drawn from the point of junction of the plaintiff's land with the land of Thomas and James Turner therein mentioned, to the nearest point of the railway there, and the whole intermediate part down to the railway—that is to say, so much of the land coloured pink in the plan which lies between the land coloured yellow, described therein as "formerly road," on the west, and such line so drawn as aforesaid on the east, and between the plaintiff's land coloured green on the plan on the north, and the railway therein described as "The London, Croydon, and Epsom Railway," on the south; such lands so recovered as aforesaid being part of the freehold land in the writ of ejectment in this action mentioned; therefore it is considered that the claimant do recover against the defendants possession of so much as aforesaid of the said land in the said writ mentioned, with the appurtenances as aforesaid.

(2) 6 Ex. 791.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Representatives of T and J Turner
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358 ft
186 ft
175 ft
173 ft
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FORMERLY ROAD
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LONDON CROYDON AND EPSOM RAILWAY
NEW WADDON ROAD
Pidlake Bridge
To Croydon
Scale of Feet
100 50 0 100 200 300 400 500

the Court below is quite impracticable; and even assuming the principle correct, the judgment gives more to the plaintiff on the west than he is entitled to.

*Baylis*, for the plaintiff (*Mellish*, *Q.C.*, and *Murphy* with him). There may be some practical difficulty in the mode of apportioning the lands; but in any mode difficulties may be suggested. Secondly, the act of 7 & 8 Vict. c. xcii. is not referred to in the act of 1863, and the "periods limited" in section 28 must be taken to refer to periods still in existence at the time the act passed, whereas the period under the act of 7 & 8 Vict. ran out in 1854. It never could have been the intention of the legislature to divest the rights of individuals who were no parties to and had no notice of the intention to pass the act of parliament. As to the land coloured brown on the west, it passed to the defendants along with the land they bought: *Salisbury* v. *Great Northern Railway Company* (1); and therefore it is like the other—mere surplus land. The land in lease was as much acquired by the company as the land to which they obtained immediate right of possession. As to the want of certainty in the verdict, the claimant must take possession at his peril according to the judgment of the Court. *Doe* v. *King* (2) is not in point; that was a case of several tenants in common.

*Hannen*, in reply. As to the act of 1863, in *Cobbett* v. *Grey* (3), it was decided that a defence arising under a statute passed subsequent to the commencement of the action may be a good bar. And there can be no doubt private rights may be affected though no notice has been given of the act of parliament: *Edinburgh Railway Company* v. *Wauchope*. (4)

*Cur. adv. vult.*

May 10. The judgment of the Court (Erle, C.J., Pollock, C.B., Martin and Pigott, BB., Willes, Keating, and Montague Smith, JJ.,) was delivered by

ERLE, C.J. In this case we affirm that part of the judgment of the Court below (5), which decides that the defendants have no defence under the statute 26 & 27 Vict. c. cxcii. s. 28,

(1) 5 C. B. (N.S.) 174.
(2) 6 Ex. 791.
(3) 4 Ex. 729.
(4) 8 Cl. & F. 710.
(5) See 5 B. & S. at p. 876; 34 L. J. (Q.B.) at p. 172.

1866

MOODY v. CORBETT.

extending the time for the sale of superfluous lands for five years, for the reasons therein assigned.

We also affirm that part of the judgment which decides that sections 216, 217 of the 7 & 8 Vict. c. xcii. extend to lands of which the reversion had been purchased subject to a term, also for the reasons therein assigned.

With respect to the part of the judgment relating to the practical application of the 217th section to the land, we have found difficulty in construing the enactment, "that the superfluous lands shall vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of the lands adjoining the same." We cannot lay down a rule that a straight line should be drawn from the point where the boundaries of two adjoining owners meet, to the nearest point of the land actually used by the company for their works, and that the portions of superfluous land on each side of that line should vest in the respective owners on whose lands they abutted.

In the case of superfluous land surrounded by lands of adjoining owners, each owner would be entitled to a portion, though the line defining some portions might be drawn in a direction from, instead of to, the works of the railway company. But, notwithstanding any difficulty, we are bound to construe and apply the statute, and we do so as follows: Where there are several adjoining properties in contact with the superfluous land in question, we think it should be divided among the owners of such adjoining properties in proportion to the frontage of each; and by frontage we mean what would be the length of the line of contact of each property if such line was made straight from the point of intersection of the boundaries on one side to the point of intersection of the two boundaries on the other side.

3 Ex 287

To exemplify an application of this principle, we assume a piece of superfluous land bounded by the railway on the south, and that the line of contact as above described of the owners adjoining it on the north is twenty feet long, and the line of contact as above described of each of the owners on the east and west is ten feet long, the owner on the north would take a half, and each of the other owners a quarter. Each owner would take a triangular piece, having the assumed straight line of contact for its base.

If this principle is applied to the present case, it may be that Mr. Turner, on the east, has in substance as much as he is entitled to, at all events we have not the data to correct this apportionment, if it is wrong.

But on the west it is found in the case that the land coloured brown on the plan (p. 516) does not belong to the plaintiff or to the defendants, therefore neither party in the cause has any claim, either to this land or in respect thereof, though, if we had to draw the western boundary of the plaintiff's portion of the part coloured red, he is not entitled to more than would be to the east of a straight line from the south-west angle of his boundary line to the nearest point of the railway works.

According to the principle of the judgment below this would cut off a portion allotted to him in that judgment; but we consider that the statute gives a title to each of the adjoining owners at the time when it comes into operation, and that all land has an owner, and that therefore the land coloured brown has an owner, and that such owner has a title to a portion on the west on the above principle, and that the plaintiff has no title to such last mentioned portion; and therefore as the plaintiff in ejectment must recover on the strength of his own title the decision in the court below on this special case for the plaintiff ought to be restricted, in the manner here laid down, in respect of a further portion of the land coloured red lying on the western side of the superfluous land in question, which is represented on the plan as coloured red.

Judgment of the Court below affirmed in part, reversed in part.

*Judgment accordingly.*

Attorneys for plaintiff: *Gregory & Co.*
Attorneys for defendants: *Faithfulls & Coode.*

[IN THE EXCHEQUER CHAMBER.]

KEMP *v.* HALLIDAY.

1866
*May* 10.

*Ship—Marine Insurance—Constructive total Loss—Cost of raising Ship and Cargo—General Average.*

A ship was submerged in deep water with heavy cargo on board; there was a common peril of destruction imminent over ship and cargo as they lay submerged; the most convenient mode of saving ship or cargo or both was by raising the ship together with the cargo; the cost of the raising would be an extraordinary expense for the common benefit of both, and the cargo would be liable to general average contribution, and the shipowner would have a lien on the cargo to secure payment of that general average. The ship being insured:—

*Held*, that in determining whether or not the ship was a constructive total loss, the amount of general average which would be contributed by the cargo must be taken into account, and the cost of raising the ship calculated as reduced by that amount.

ERROR from the judgment of the Court of Queen's Bench, in favour of the defendant on a special case. (1)

The declaration was on an ordinary policy of insurance, dated the 6th of October, 1863, effected by the plaintiff on the ship *Chebucto*, from Liverpool to Rio de Janeiro, valued at 1500*l.*; underwritten by the defendant for 25*l.*

The defendant paid 18*l.* 15*s.* into court.

The plaintiff claimed ultra.

At the trial before Mellor J., at the sittings in London, after Trinity Term, 1864, a verdict was found for the plaintiff, subject to the following case:

1. The *Chebucto*, the vessel insured, belonging to the plaintiff, sailed on the 21st of October, 1863, from Liverpool for Rio de Janeiro, on the voyage insured, laden with a general cargo.

2. In the due prosecution of her voyage, the ship met with heavy gales, and worked, strained, and leaked very much, so that it became necessary, by reason of the perils of the seas, for the safety and preservation of the cargo, ship, and crew, to cut away all forward, and to bear up for and put into Falmouth Harbour as a port of refuge, where the vessel, with her cargo on board, came to anchor on the 12th of November, 1863.

(1) See 34 L. J. (Q.B.) 233.

3. By reason of the premises, a certain general average loss was sustained.

4. On the arrival of the ship at Falmouth, the master of the ship applied to Messrs. Broad & Sons, who are ship agents at Falmouth, requesting them to act as agents for the ship, and Messrs. Broad & Sons agreed so to do.

5. On the recommendation of surveyors employed by the master, the ship was passed inside the breakwater, and was moored to the pier for the purpose of being repaired, and a portion of the cargo was discharged, the heavier portion of the cargo, however, being left in the ship. The repairs were then proceeded with, but were not completed by the 2nd of December, 1863.

6. On the 2nd of December, whilst the ship was lying moored to the pier, there blew a hurricane, which caused the ship, with that part of the cargo which had not been discharged, to sink at her moorings, at a place where at low water there was a depth of twenty-two feet, and at high water a depth of forty feet.

7. On the same day, namely, the 2nd of December, 1863, the plaintiff was informed by a telegram sent to him by the master of the ship, that she had sunk in Falmouth Harbour, and on the following day a Mr. Amos, a person experienced in the surveying and repairing of ships, arrived at Falmouth with full authority from the plaintiff to investigate the whole matter, and to act for him in all matters concerning the ship as according to the best of his judgment would be best for all concerned. Mr. Amos having examined the position of the ship, and having informed himself of her prior condition, and taking into consideration the probable injuries the ship had sustained, and having formed a judgment of the cost of raising her and of her further repairs, came to the conclusion that it would cost more to raise and repair than she would be worth when repaired. Accordingly, on the 4th of December, he, on the part of the plaintiff, gave notice to Broad & Sons that the plaintiff abandoned the ship, and would not be responsible for and would have nothing to do with raising or repairing her.

8. On the 7th of December, a surveyor, Mr. Thomas, by the orders of Messrs. Broad & Sons (which were given on their own responsibility, and not as agents for the plaintiff), commenced

1866

KEMP v. HALLIDAY.

raising the ship; and on the 20th of that month he succeeded in raising her, with all those goods on board of her which had not been discharged before the aforesaid 2nd of December. She was subsequently moved into dock by the orders and under the superintendence of the master, who had remained at Falmouth since the arrival of the ship in that harbour, notwithstanding that Mr. Amos, on his visit to Falmouth, had expressly ordered the captain to have nothing to do with the ship; and at the commencement of this action she was lying at Falmouth safely moored.

9. On the 4th of December, the captain, by the instructions of Amos, signed and sent a notice of abandonment to Davies & Co. of Liverpool, the brokers who had effected the policy of insurance, and who then held the same; and on the 9th of December Davies & Co. gave due notice of abandonment to the defendant as follows:

"Liverpool, 9th December, 1863.

Messrs. Burn & Airley,

On behalf of owners of *Chebucto* we beg to give you notice that the vessel is abandoned to you in Falmouth Harbour."

10. The value of the cargo, which sank in the ship and which was raised in her, was, when raised, 1750*l.*; the value of that previously taken out was 7000*l.* The amount of the whole freight by the charter party was 475*l.*, and upon the goods sunk, 237*l.* 10*s.*; the whole net freight was 150*l.*, and that upon the goods sunk, 75*l.*

11. The questions that were left to the jury were, whether there was a constructive total loss of the vessel, first, at the time when Mr. Amos gave notice to Broad & Sons that the plaintiff abandoned her; or, secondly, at the time she lay moored after being raised, both of which questions were answered in the affirmative. In putting these questions to the jury, no account was taken of any liability on the part of the cargo or freight to contribute in a general average towards the expenses of raising the vessel or towards the general average loss at sea; and it is to be taken as a fact, that if such liability for either loss ought to have been taken into cal-

culation, and the estimate of the cost of raising and repairing ought to have been reduced by the amount of the general average to be so contributed, then that there was not a constructive total loss.

The Court or Court of Appeal were to be at liberty to draw inferences of fact, in the same way as a jury would be entitled to do.

The questions for the opinion of the Court were:

First, whether the plaintiff is, under the above circumstances, entitled to recover on the policy against the defendant as for an absolute total loss, as distinguished from a constructive total loss.

If the Court should answer the above question in the negative, then—Secondly, whether it was material, in determining the question of constructive total loss, to take into account the liability, if any such existed, of the cargo and freight to make a general average contribution towards the expenses of raising the ship, or towards the general average loss at sea.

Thirdly, whether the notice of abandonment was given too late.

In the Court of Queen's Bench, Blackburn, J., was of opinion, that there was not an actual nor constructive total loss; for that the ship was not actually lost, but, being with the cargo in imminent peril, the cost of raising ship and cargo would be general average; and that the contribution of the cargo to the general average must be taken into account as reducing the cost of raising the ship. Shee, J., was of a contrary opinion, but withdrew his judgment; and judgment was entered for the defendant, in accordance with the opinion of Blackburn, J. (1)

February 1. *Watkin Williams*, for the plaintiff.

[*Cohen*, for the defendant, intimated that he abandoned the question of general average loss at sea.]

First, the cost of raising the ship was not general average. The ship was not raised by the owners but by salvors; but assuming that to make no difference, this would not be general average. There must be common danger imminent to both ship and cargo, and there must be a voluntary sacrifice to avert that danger: Benecke, p. 165; and it is quite clear that if the cargo is in no danger, and the operation is necessary for the pro-

(1) See 34 L. J. (Q.B.) 233.

1866

KEMP v. HALLIDAY.

secution of the voyage, that is not general average, although the cargo may be incidentally benefited by it: *Job* v. *Langton* (1); *Moran* v. *Jones* (2); Benecke, pp. 192—3, 215. Secondly, supposing this to be general average, the right of contribution is not to be taken into consideration in ascertaining whether the ship was or was not a constructive total loss. Blackburn, J., in his judgment, proceeded on the principle of *Rosetto* v. *Gurney* (3), *Irving* v. *Manning* (4), and other cases, viz., that the question is, what a prudent uninsured owner would do under the given circumstances, and that he would raise the ship if the cargo would contribute to general average, and therefore that the contribution by the cargo to general average must be taken into account. But that is not the true criterion; for suppose a ship damaged, and that the cost of putting her into repair would be 5000*l.*, and when repaired she would be worth 6000*l.*, according to the above principle she is not a total loss, as the owner would repair her. But a prudent uninsured owner would not repair her if he would get, say, 3000*l.* for her as she stood. Extrinsic circumstances in which the owner happens to be placed, therefore, cannot be looked at. The subject of insurance alone must be considered; and the question is, Taken alone, is the ship worth raising and repairing? It may also be observed that the master cannot force the cargo to contribute to general average, where he has an opportunity, as in the present case, of consulting the owners: Benecke, pp. 171—2; Emerigon, ch. 12, s. 4. Again, it is said that even if the ship were once a total loss, she was not so up to the commencement of the action; but was or could have been restored to the owner. But this principle only applies to cases of capture and recapture: *Hamilton* v. *Mendes* (5); *Bainbridge* v. *Neilson* (6); *Smith* v. *Robertson.* (7) And even in that case mere recapture does not prevent the loss being total; the ship must be restored only slightly damaged, or without much expense being incurred by the assured: *M'Iver* v. *Henderson* (8);

(1) 6 E. & B. 779; 26 L. J. (Q.B.) 97.
(2) 7 E. & B. 523; 26 L. J. (Q.B.) 187.
(3) 11 C. B. 176; 20 L. J. (C.P.) 257.
(4) 1 H. L. C. 287, 306—7.
(5) 2 Burr. 1198.
(6) 10 East. 329.
(7) 2 Dow. 474.
(8) 4 M. & S. 576.

*Lozano* v. *Janson.* (1). Here the plaintiff could only obtain his ship on payment to the salvors; for it is a fallacy to say that the salvors would be prevented recovering by section 450 of the Merchant Shipping Act, 17 & 18 Vict. c. 104, not having proceeded under that section; for that section only applies to wreck, which is defined by s. 2, to include "jetsam, flotsam, lagan, and derelict;" and this ship was not derelict.

*Cohen*, for the defendant. It is scarcely contended that the ship was an actual total loss; it is clear that she was not, as the spes recuperandi was never gone: 2 Arnould's Ins., 2nd ed. pp. 1021—2; citing Lord Abinger, C.B., in *Roux* v. *Salvador.* (2) Neither was she a constructive total loss; the mere submersion of a ship does not authorize abandonment: 2 Phillips on Ins., s. 1527; 2 Parsons' Maritime Law, b. ii. c. 10, p. 404. Moreover, the notice of abandonment was too late. [On this point, as to which the Court expressed no opinion, he cited *King* v. *Walker* (3); *Farnworth* v. *Hyde* (4); *Hunt* v. *Royal Exchange Assurance* (5); 2 Arnould's Ins., 2nd ed. p. 1164.] But assuming due notice was given, there was not a constructive total loss when the ship was sunk. The shipowner would have a lien on the cargo for general average, which is equivalent to having the contribution in hand; or there would be, as is the general practice, a general average bond. This part of the case, therefore, depends chiefly on whether the raising of the ship was, under the circumstances, general average. Any extraordinary expenditure, when for the joint benefit of ship and cargo, both being exposed to the common danger, is general average: 2 Arnould's Ins., 2nd ed. p. 932. The cargo need not be exposed to extreme danger; for the expenses of discharging a cargo if necessary in order to get the ship off when aground are general average: *Moran* v. *Jones* (6); and the cargo would not then be in greater danger than when at the bottom of the sea. The same principle has been applied for years in salvage suits; if ship and cargo are saved simultaneously, the salvors' remuneration is paid in

(1) 2 E. & E. 160; 28 L. J. (Q.B.) 337.

(2) 3 Bing. N. C. at p. 279.

(3) 2 H. & C. 384; 33 L. J. (Ex.) 325.

(4) 18 C. B. (N.S.) 835; 34 L. J. (C.P.) 207.

(5) 5 M. & S. 47.

(6) 7 E. & B. 523; 26 L. J. (Q.B.) 187.

1866

KEMP v. HALLIDAY.

proportion to the respective value of the ship and cargo. If this was general average, then the plaintiff has a lien on the cargo for the amount of contribution; consequently, in calculating the expense of raising the ship, with a view to ascertain whether a prudent uninsured owner would take to the ship, it is clear that he would take into account that the expense would be only the whole expense minus the cargo's proportion. The underwriter is never liable for the whole average, but only for the proportion to which the subject of insurance has to pay: 2 Arnould's Ins., p. 824, 3rd ed.; Baily on Average, pp. 138—150; and if general average in such a case as the present were not to be taken into account, it would indirectly make the whole fall on the underwriter. [He contended, lastly, that the ship was not a total loss at the commencement of the action; and that there would be no lien on the ship for the salvage, nor any liability to a salvage suit. On this he cited 17 & 18 Vict. c. 104, s. 450; *Hamilton* v. *Mendes* (1); 2 Arnould's Ins., p. 921—932, 3rd ed.; Phillips on Insurance, s. 1594. *Lozano* v. *Janson* (2); *Castellain* v. *Thompson* (3); *Atkinson* v. *Woodall* (4); *Briggs* v. *Merchant Traders Ship Association* (5); Pritchard's Admiralty Dig. 796.]

*W. Williams*, in reply, cited *Hunt* v. *Royal Exchange Assurance* (6), as shewing that the notice of abandonment was in time.

*Cur. adv. vult.*

May 10. The judgment of Erle, C.J., Pollock, C.B., Channell and Pigott, BB., and Keating and Montague Smith, JJ., was delivered by

ERLE, C.J. In this case we affirm the judgment for the defendant, and give the same answers to the two questions in the special case as were given in the court below; being of opinion, first, that there was no absolute total loss; and secondly, that it was material, in determining the question of constructive total loss, to take into the account the liability, if any such existed, of the

(1) 2 Burr. 1198.
(2) 2 E. & E. 160; 28 L. J. (Q.B.) 337.
(3) 32 L. J. (C. P.) 79; 13 C. B. (N.S.) 105.
(4) 31 L. J. (M.C.) 174.
(5) 13 Q. B. 167.
(6) 5 M. & S. 47.

cargo and freight to make general average contribution towards the expenses of the ship.

The real dispute was confined to the second question; and although the case has been argued with remarkable learning, both here and in the court below, yet our decision turns upon inferences of fact from the statement in the special case, more than upon any point of law.

We do not lay down a rule, that all claims for contribution to the ship from any other interest ought to be taken into the account in determining whether the ship was worth raising. But we hold that the plaintiff, in considering whether the submersion of his ship, containing cargo as stated in the case, was a constructive total loss, was bound to take into his estimate the fact that cargo would be saved by the operation which raised the ship, and would contribute to the expense thereof; and that the circumstances which would go to increase or diminish the outlay required for raising and repairing the ship, and the circumstances which would go to increase or diminish the benefit to be derived from that outlay, are elements in calculating whether the cost of raising would exceed the value when saved.

We infer from the statement in the case that there was a common peril of destruction imminent over ship and cargo as they lay submerged; that the most convenient mode of saving either ship or cargo, or both, was by raising the ship together with the cargo; that the expense required for such raising would be an extraordinary expense for the common benefit of both; that the cargo would be liable to a general average contribution towards the expense; and the shipowner would have a lien on the cargo to secure the payment of that general average.

If these facts are properly inferred from the statement of the special case, it follows that the plaintiff, in calculating the cost of raising, was bound to take into his estimate the contribution which would become due to him from the cargo secured to him by a lien thereon; and if so, the special case provides that the defendant should succeed.

If the case had not been so stated, and we had to apply the common rule, we should consider that a prudent owner uninsured would calculate on the amount of the general average contribution, inse-

1866

KEMP v. HALLIDAY.

parably connected with the raising of the ship and safely secured, with as much reliance as he could calculate on the value of the ship itself when repaired; it being clear that all the items, both of cost and of value, on which the owner is to make his calculation when electing between repairing or abandoning, are subject to contingency and matter of conjecture only.

In this decision, we have adopted the principle on which Blackburn, J., relied below, and we refer to his judgment for a more ample statement of that principle in the application of it to this case.

Martin B., and Willes, J., desire me to say that in their opinion there ought to be a new trial, on the ground that the facts are not sufficiently stated to enable the Court to pronounce judgment.

*Judgment affirmed.*

Attorney for plaintiff: *J. L. Mathews.*

Attorneys for defendant: *Field, Roscoe, & Co.*

END OF EASTER TERM.

# CASES

DETERMINED BY THE

# COURT OF QUEEN'S BENCH

AND BY THE

# COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH

IN AND AFTER

## TRINITY TERM, XXIX VICTORIA.

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### THE QUEEN *v.* STONE.

1866
*May* 31.

*Lands Clauses Consolidation Act* (8 *Vict. c.* 18), *ss.* 18, 121—*Compensation—Tenant from year to year—Demand of Possession—Notice to Treat—Railway Company.*

Section 121 of the Lands Clauses Consolidation Act enacts, "If any lands (authorized to be taken) shall be in the possession of any person having no greater interest than as tenant for a year or from year to year, and if he be required to give up possession of any of the lands before the expiration of his term or interest, he shall be entitled to compensation for the value of his unexpired term or interest":—

*Held*, that the section applies only to cases where the tenant has been required to give up possession of his land; and that a notice to treat, under section 18, is not equivalent to requiring possession.

THIS was a rule calling on the defendant, an alderman and justice of the city of London, to shew cause why a mandamus should not issue commanding him to hear and determine the question of compensation to be paid by the Metropolitan Railway Company to John Gibbs, for the value of his unexpired term or interest in certain lands and hereditaments situate at 61, Fore Street, in the

1866

THE QUEEN v. STONE.

city of London, required to be taken by the company, under the powers of their acts, and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury which he might sustain.

It appeared from the affidavits that John Gibbs was the lessee of a shop and premises, situate at 61, Fore Street, for a term of three years, which would expire on the 24th of June, 1866. The Metropolitan Railway Company under their acts were authorized to purchase the shop and premises subject to the provisions of the Lands Clauses Consolidation Act, 1845, and accordingly on the 10th of January, 1866, they served Gibbs with the usual notice to treat under section 18 of that act (8 Vict. c. 18), viz., that the company required to purchase and take the shop and premises, and were willing to treat for the purchase and compensation to be made for the damage by reason of the execution of the works; and demanding particulars of his estate and interest and of his claims in respect thereof. On the 6th of February, 1866, Gibbs sent to the company the particulars of his estate, &c., and of claim, as requested by the notice to treat, which amounted to the sum of 573*l*. The company not having taken any steps for having the amount of compensation assessed, Gibbs summoned the company (1) before the defendant, and claimed to have the amount assessed under section 121. At the hearing it was objected on behalf of the company, that the claimant had not been required to give up possession of his shop and premises before the expiration of his term or interest therein, within the meaning of section 121, and that the defendant had no jurisdiction. It was contended on behalf of the claimant that the company had, by the effect of their notice to treat, brought themselves within the provisions of section 121, and that the defendant was bound to hear the question of disputed compensation. The defendant considered he had no jurisdiction, and refused to entertain the question. (2)

(1) See section 24 of 8 Vict. c. 18.

(2) 8 Vict. c. 18, s. 18, enacts, "When the promoters of the undertaking shall require to purchase or take any of the lands which by this or the special act, or any act incorporated therewith, they are authorized to purchase or take, they shall give notice thereof to all parties interested in such lands, or to the parties enabled by this act to sell and convey or release the same, or such of the said parties as shall after diligent inquiry be known to the promoters of the undertaking, and by such notice shall de-

*Keane, Q.C.*, shewed cause. The defendant had no jurisdiction to assess compensation. The question turns upon section 121 of the Lands Clauses Consolidation Act, and it is clear that under that section justices have no jurisdiction to assess compensation unless the tenant has been required to give up possession of his land before the end of his term. *Reg.* v. *Sheriff of Middlesex* (1) decided that a tenant from year to year, the possession of whose property is not required to be given up, but is injuriously affected by the execution of the works, is not entitled to have compensation assessed under section 121, but must claim compensation under section 68, the ratio decidendi being, that section 121 does not apply unless the claimant is required to give up possession of the property; in the present case the claimant has not been required to give up possession, he has only received a notice to treat. *Reg.* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (2) is also an authority to shew that unless the company have taken the claimant's land section 121 does not apply.

*Horace Lloyd*, in support of the rule. There is no direct authority on the point. In *Reg.* v. *Sheriff of Middlesex* (1), none of the claimant's land was touched or taken, nor was it required by

mand from such parties the particulars of their estate and interest in such lands, and of the claims made by them in respect thereof; and every such notice shall state the particulars of the lands so required, and that the promoters of the undertaking are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works."

s. 121. "If any such lands shall be in the possession of any person having no greater interest therein than as tenant for a year or from year to year, and if such person be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands, and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury he may sustain; or if a part only of such lands be required, compensation for the damage done to him in his tenancy by severing the lands held by him or otherwise injuriously affecting the same; and the amount of such compensation shall be determined by two justices in case the parties differ about the same; and upon payment or tender of the amount of such compensation, all such persons shall respectively deliver up to the promoters of the undertaking, or to the person appointed by them to take possession thereof, any such lands in their possession required for the purposes of the special act."

(1) 31 L. J. (Q.B.) 261.

(2) 4 E. & B. 88.

1866

THE QUEEN v. STONE.

the company; the claim was for compensation for lands "injuriously affected," and the decision was, that a claim for compensation for lands injuriously affected under section 121 was restricted to cases in which the whole or a part of the lands were required by the company. In the case of *Reg.* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (1), the claimant was the master of a chartered school removeable on receiving three months' notice, and the occupier of houses which the company had taken, the Court decided that the claimant could not be considered to have a greater interest than that of a tenant from year to year, and that the proper mode to recover was under section 121. In the present case a notice to treat has been given, and the company cannot retract that notice. The effect of the notice is to place the parties in the relation of vendor and purchaser; it constitutes a contract in equity, and though a court of equity would not enforce a specific performance, they would compel the company to have compensation assessed.

[COCKBURN, C.J. Section 121 says: "If possession of the land is required to be given up"—how is the claimant brought within the section?]

The notice to treat is equivalent to requiring possession. After the notice to treat has been given the tenant whose lease is about to expire could not obtain a renewal of the term; the company, if desirous, could enter upon the premises under section 85, and he would be obliged to obtain other premises, and incur the expense of adapting them to his business.

[COCKBURN, C.J. If after a notice to treat given to a tenant from year to year the company were entitled to take immediate possession of the premises, that argument would be cogent; but under section 121 it is only upon payment or tender of the amount of compensation that the company could take possession.]

It is quite clear that the claimant is entitled to compensation; the only question is, in what way is he to obtain it? The notice to treat has the same effect as in any other case, for section 18 applies to all cases, whether it be that of a tenant from year to year or tenant in fee. It would be a great hardship on the claimant if after a notice to treat he could not compel

(1) 4 E. & B. 88.

the company to have the compensation assessed under section 121.

COCKBURN, C.J. I am of opinion that the rule must be discharged. The question is, whether the applicant is entitled to have compensation assessed in the mode required by section 121. The company have given a notice to treat as required by section 18, but they have done nothing more. The contention on behalf of the applicant is, that giving notice to treat is equivalent to requiring possession to be given up under section 121. The argument must go that length, because the section applies to those cases only in which land is in the possession of a person having no greater interest than as tenant for a year or from year to year, and such person is required to give up possession of the land. The question then is, whether a notice to treat is equivalent to requiring possession. It clearly is not, because in cases where a notice to treat has been given, the right to enter into possession, can only be according to the modes pointed out by the statute, that is, either when the compensation has been settled, or upon giving security for the amount under section 85. Here there has been nothing more than a notice to treat given. The company, therefore, are not in a position to require possession to be given, nor is the applicant in a situation in which he can be compelled to give up possession; consequently section 121 does not apply, and the applicant is not entitled to have the rule made absolute.

BLACKBURN, J. The simple question is, whether a notice to treat can be considered as equivalent to requiring possession of land under section 121. The section is clear, and unless the tenant has been required to give up possession the case does not come within the section; neither does section 22 apply, because the value of the land exceeds 50*l*. All that has been done here is to give a notice to treat, and that certainly seems to me to be a very different thing from requiring possession of the land. The effect of the notice to treat having been given may be to make the tenant's holding precarious and unmarketable, but that does not affect the question. I say nothing as to whether the applicant has a remedy under section 68.

LUSH, J. I am of the same opinion. It is a condition prece-

1866

THE QUEEN v. STONE.

dent to the right to compensation under section 121 that the tenant should be required to give up possession of the land. I think a notice to treat is not equivalent to requiring possession.

*Rule discharged.*

Attorneys for the prosecution: *Mason, Sturt, & Mason.*
Attorneys for defendant: *Burchells.*

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*June* 13.

HIBBS *v.* ROSS.

*Evidence—Ship—Register—Proof of Ownership primâ facie evidence of employment of those on board—Negligence—Master and Servant.*

A ship was laid up in a public dock for the winter, under the care of a shipkeeper; the plaintiff, being lawfully on board, suffered injury from the negligence of the persons in charge of the ship, and brought an action against the defendant. At the trial there was no evidence by whom the shipkeeper was appointed, and the only evidence to fix the defendant with liability was the ship's register, on which his name appeared as owner:—

*Held* (by Blackburn and Lush, JJ.; Mellor, J., dissenting), that the register was primâ facie evidence for the jury, from which they might draw the inference that the persons in charge of the ship were employed by the defendant.

FIRST count. That the defendant was possessed of a vessel called the *Jarnia,* lying in a dock belonging to the Grand Surrey Docks and Canal Company, and the plaintiff was then the master of and in charge of another ship called the *Mouldslie,* lying in the same dock alongside of the said *Jarnia,* and by reason of the *Jarnia* lying between the quay of the dock and the *Mouldslie,* so that without passing over the decks of the *Jarnia* it was impossible for persons on board the said *Mouldslie* conveniently to reach the shore, the plaintiff as the person in charge of the *Mouldslie* was by the usage of the said dock entitled as of right at all times at his own will and pleasure to pass over and across the decks of the defendant's ship, the *Jarnia,* for the purpose of passing to or from the shore, as the defendant then well knew, yet the defendant negligently, carelessly, and improperly removed the hatches from one of the hatchways leading into the hold of the *Jarnia,* in the direct course in which persons passing from the *Mouldslie* to the shore were in the habit of passing and must

necessarily pass, and allowed the hatches to remain off after dark, and the hatchway to remain and be unguarded and unfenced, whereby the plaintiff, having occasion at night and after dark to pass from his ship, the *Mouldslie*, to the shore over the decks of the *Jarnia*, fell down the hatchway, and was precipitated through the same into the hold of the ship, and by means of the premises the plaintiff was much hurt, bruised, and injured, &c.

The second count alleged the plaintiff's right of passage over the *Jarnia*, by mutual agreement between the plaintiff and defendant.

The third count alleged the plaintiff's passage by licence of the defendant.

Pleas. 1. Not guilty. 3. To the first count, that the defendant was not possessed of the *Jarnia*. There were other pleas which are immaterial to the point raised.

At the trial before Mellor, J., at the sittings in London after Trinity Term, 1865, the facts of the accident, as alleged in the declaration, were proved to have taken place at 8.30 P.M. on the 26th of December, 1864. The *Jarnia* was then, and had been for some time, laid up in the dock for the winter, and was in charge of a "shipkeeper." There was no evidence by whom the shipkeeper was appointed, and the only evidence to fix the defendant with liability was the certified copy of the ship's register, dated 21st of September, 1864, in which the defendant's name appeared as owner.

The defendant's counsel objected that the certificate alone was not sufficient; the learned judge was of that opinion, and reserved leave to the defendant to enter a nonsuit; and the evidence being contradictory, he left to the jury to say whether the negligence of those in charge of the *Jarnia* was the cause of the accident, or whether the plaintiff himself contributed to it. The jury returned a verdict for the plaintiff for 450*l.*

A rule was afterwards obtained, pursuant to the leave reserved, to enter a nonsuit, on the ground that there was no evidence to fix the defendant.

January 13. *W. B. Cooper* shewed cause. The certificate of registry proved the ownership of the *Jarnia* to be in the de-

1866

HIBBS v. ROSS.

fendant, and that primâ facie makes him liable for the negligence of those in charge of her.

[BLACKBURN, J. The question is, was there evidence that the defendant was the master of the persons whose negligence caused the injury?]

The ship was registered in September, 1864, under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), and by section 107 of that act the certificate is primâ facie evidence of ownership. (1)

[BLACKBURN, J. But is proof of ownership enough? Mere ownership being shewn, is it the presumption that the persons on board in charge were employed by the owner?]

Ownership need not necessarily carry with it possession, but it is primâ facie evidence of it. In *Cox* v. *Reid* (2), and in *Fletcher* v. *Reid* (3), both Best, C.J., and Lord Gifford held that the register was primâ facie evidence of liability for repairs ordered by the captain against the person appearing on the register as owner, and called for an answer.

[BLACKBURN, J. The latest cases on the subject are *Frost* v. *Oliver* (4) and *Mitcheson* v. *Oliver* (5), in which the liability of persons appearing as registered owners was fully discussed. But neither of those cases *decided* that the registry was primâ facie evidence of liability.]

(1) 17 & 18 Vict. c. 104, s. 107 :— "Every register of or declaration made in pursuance of the second part of this act in respect of any British ship may be proved in any court of justice, or before any person having either by law or by consent of parties authority to receive evidence, either by the production of the original or by an examined copy, or by any copy thereof purporting to be certified under the hand of the registrar or other person having the charge of the original, which certified copies he is hereby required to furnish to any person applying at a reasonable time for the same, upon payment of 1s. for each such certified copy; and every such register or copy of a register, and also every certificate of registry of any British ship, purporting to be signed by the registrar or other proper officer, shall be received in evidence in any court of justice, or before any person having by law or by consent of parties authority to receive evidence, as primâ facie proof of all the matters contained or recited in such register when the register or such copy is produced, and of all the matters contained in or indorsed on such certificate of registry, and purporting to be authenticated by the signature of a registrar, when such certificate is produced." See also 18 & 19 Vict. c. 91, s. 15.

(2) Ry. & Mood. 199.

(3) Ry. & Mood. 202 n.

(4) 2 E. & B. 301; 22 L. J. (Q.B.) 353.

(5) 5 E. & B. 419; 25 L. J. (Q.B.) 39.

1866

HIBBS v. ROSS.

The last case on the subject is *Pearson* v. *Nell.* (1) The plaintiff in an action of tort is in a very different position from the plaintiff in a contract, and a very different amount of evidence is necessary. A contract is voluntary on the part of the plaintiff, and he must take the chance of being able to prove the agency from the defendant of the person with whom he dealt.

[MELLOR, J. The ship was laid up in dock. There was no evidence by whom the shipkeeper in such cases is appointed; very possibly by the dock company.]

May 7. *Brett, Q.C.*, in support of the rule. It is a fallacy to say there is any difference between an action of contract and tort, in either case it lies on the plaintiff to prove that the person he seeks to charge stands in the relation of principal or master to the person by reason of whose act he seeks to charge him. In the common action for goods supplied or work done to a ship on the order of the master, the mere production of the register was formerly held conclusive evidence that the master was the master of the registered owner. That has been long exploded; and all the cases down to *Frost* v. *Oliver* (2), and *Mitcheson* v. *Oliver* (3), shew that the register is not conclusive, but it may be contradicted by shewing whose master the master really is; that was all that was necessary to the decision of the cases; and there are none to be found of late years which go the length of shewing that the register per se is enough to call for an answer on the part of the defendant. On the contrary, in *Hackwood* v. *Lyall* (4), Cresswell, J., says: "At one time the register was considered to be conclusive evidence of ownership in an action for repairs or for necessaries supplied to a ship, now it is not considered even primâ facie evidence"; and Jervis, C.J., observes: "The register acts are mere matter of fiscal regulation."

[MELLOR, J. In Maude and Pollock on Shipping, 2nd ed. p. 59, citing *Mitcheson* v. *Oliver* (3), it is said that the evidence must shew that the master is the *defendant's master*, or so held out by him.

BLACKBURN, J. No doubt Parke, B., in delivering the judg-

(1) 13 W. R. 967; before Crompton and Mellor, JJ., in the Bail Court.

(2) 2 E. & B. 301; 22 L. J. (Q.B.) 353.

(3) 5 E. & B. 419; 25 L. J. (Q.B.) 39.

(4) 17 C. B. at p. 125.

1866

HIBBS v. ROSS.

ment of the Exchequer Chamber in *Mitcheson* v. *Oliver* (1), says: "If the jury drew the primâ facie inference from the ownership and other facts, there was evidence on which they might find that the master was in fact master for the defendant"; but the other facts were little beyond mere possession.]

There is no possession shewn here, and surely mere evidence of title is not primâ facie evidence of possession. In Maclachlan on Shipping, p. 103, the relation of master and owner is put as that of principal and agent, and it is said: "Defendants are not liable, on contracts for the ship made by the master merely because they are owners, or appear on the register as owners, or hold themselves out as owners, and are in possession of the ship at the time of the contract." This is not the common case of a ship under navigation, when possibly the owner might be assumed primâ facie to be himself navigating her by master and crew, but it is the case of a ship laid up for the winter in a public dock, in which case it is just as likely, if not more so, that she would be in the care of servants of the dock company.

*Cur. adv. vult.*

June 13. The following judgments were delivered:

MELLOR, J. In this case the defendant is sought to be made responsible for an accident which happened to the plaintiff in lawfully crossing a ship called the *Jarnia*, lying in the Surrey Dock, to get from another ship called the *Mouldslie*, lying alongside, to the quay.

It must be taken for granted upon the finding of the jury, that the accident was occasioned by the negligence of the shipkeeper of the *Jarnia*, which ship was then and had been for some time laid up in the dock for the winter. The only evidence to fix the defendant with liability was the proof of the register, in which he was described as owner. There being no other evidence, I was of opinion, that the registry of ownership, without more, was insufficient for that purpose; but I left questions as to the fact of negligence and of contributory negligence to the jury, who found their verdict for the plaintiff, and assessed the damages at 450*l.*, and I thereupon reserved leave for the defendant to move to enter a nonsuit,

(1) 5 E. & B. at p. 445.

in case the Court should be of opinion that there was not sufficient evidence for me to leave to the jury to entitle them to find for the plaintiff. A rule to set aside that verdict, and to enter a nonsuit pursuant to the leave reserved, was obtained by Mr. Brett, and the question now arises, whether the mere proof that the defendant was the registered owner of the ship is primâ facie sufficient to fix him with liability for the negligence of the shipkeeper. I retain the opinion which I formed at the trial, viz., that such evidence alone was not enough to submit to the jury to support the allegation in the declaration, that "the defendant negligently removed the hatches," whereby the accident complained of happened. In order to make the defendant liable, it was incumbent on the plaintiff, upon whom the burden of proof rested, to shew affirmatively that the shipkeeper was the defendant's servant. This depends upon the ordinary principles of law, applicable to the case of master and servant, and is not embarrassed by considerations arising out of the peculiar relation which the captain of a ship in general bears to the owner, and upon which the liability of the owner of a ship for repairs done to it, or for necessaries supplied to it, by the captain's orders, may depend. Even in that case, it would appear to be incumbent upon the plaintiff, who seeks to render an owner liable, to shew affirmatively that the master who gave the orders was the master appointed by or sanctioned by the owner, so as to make him in the particular case "his master": *Mitcheson* v *Oliver*. (1) As was said by Erle, J., in *Frost* v. *Oliver* (2): "The doctrine that the legal ownership of the ship is proof that the master has authority to contract for such owner has been repeatedly negatived." That it is a material circumstance as a step towards proof is undoubted, and coupled with evidence that the repairs were done for the benefit of the ship, or the stores were supplied for its use, may in general be a sufficient primâ facie case to call for evidence by way of explanation or answer; but I apprehend that the present case differs materially from that. Here the registry is the only evidence, and I cannot perceive that the single fact of ownership raises a presumption that the man in charge of

(1) 5 E. & B. 419; 25 L. J. (Q.B.) 39.

(2) 2 E. & B. at p. 319; 22 L. J. (Q.B.) at p. 360. See also *Pearson* v. *Nell*, 13 W. R. 967, before Crompton and Mellor, JJ., in the Bail Court, June 15, 1865.

1866

HIBBS v. ROSS.

the ship was the servant of the owner or appointed by him, and unless there is a presumption of fact arising out of the mere ownership of the ship, to that effect, the rule to enter a nonsuit ought to be made absolute.

The ship was not in the course of navigation, and there was absolutely nothing to shew that the owner ever came near the ship, or knew that it was in the dock. Whether the ship was in the possession of the owner, or of a mortgagee, or of the dock authorities, or of a broker, or of any other person, did not appear. In the case of *Mitcheson* v. *Oliver* (1), Parke, B., in delivering the judgment of the Court of Exchequer Chamber, in remarking upon a passage of Lord Campbell's summing up, in which he had put it to the jury "whether, upon the evidence on both sides, they were of opinion that the defendant had authorized the goods and work to be supplied and done on his credit," &c., proceeds as follows: "No doubt if the jury disbelieved the parts of the case that made for the defendant, and drew the primâ facie inference from the ownership *and other facts*, there was evidence on which they might find that Thompson was in fact master for the defendant." It appears to be clear, I think, that Baron Parke did not consider that the mere fact of ownership, without "*the other facts*," would have afforded even primâ facie evidence that Thompson was the defendant's master. The action was for ordinary repairs done to the ship, and for goods supplied to it, upon the orders of the registered master, and there were other circumstances tending to raise an inference as to the liability of the defendant; but it never appears to have been contended by the counsel, or suggested by any of the judges, that the registry alone would have been sufficient proof that the captain was the captain of the owner, so as to bind him. However this may be in the case of repairs done to a ship, or stores supplied to it, for the apparent benefit of the owner, the same reasoning does not apply to the present case.

I think that it would be unduly shifting the burden of proof to call for an answer to the mere fact of ownership, and I cannot see why any presumption should be made which would dispense with the necessity of further proof. Possession may be presumptive

(1) 5 E. & B. at p. 445.

evidence of title, but the converse does not necessarily hold, viz., that title is presumptive evidence of possession. It is obvious that in the case of things which are constantly the subject of demise, charter, mortgage, or the like, the presumption that the actual possession is in the owner cannot but be weak, and is not to be classed with those strong presumptions which shift the burden of proof from a plaintiff to a defendant. There exists an exception to the general rule that a party who alleges a matter must prove it, in cases in which the subject matter of the allegation lies *peculiarly within the knowledge of one of the parties.* In this case there is no peculiar knowledge on the part of the defendant within the meaning of that maxim. In one sense, in almost every case the defendant has peculiar knowledge affecting his relation to the act complained of, but that is not the knowledge referred to. Here the shipkeeper could have proved by whom he was appointed, and so have laid a good foundation for the plaintiff's case, if appointed by the defendant. Why should the burden of proof shift in such a state of things in order to compel a defendant to disprove that which was incumbent upon the plaintiff to prove? I am not aware of any case in which such evidence has been held sufficient, and I think that all experience at nisi prius is against it. For these reasons I am of opinion that this rule should be made absolute; but as a majority of the Court is of a different opinion, the rule will of course be discharged.

BLACKBURN, J. In this case, tried before my Brother Mellor, it appeared that the plaintiff was lawfully passing over a ship then lying in dock under the charge of a shipkeeper, in order to reach the shore from his own vessel, which lay on the other side. In so doing he fell through an unsecured hatchway, and sustained considerable injury. There was evidence, proper to be left to the jury, that this accident was occasioned by the negligence of those having the charge of the ship, over which it was known that the plaintiff might pass, in not keeping it reasonably safe; and the evidence was such as to make it a question for the jury whether the plaintiff had or had not himself contributed to the accident by the want of reasonable care on his part; but the only evidence to connect the defendant with those having charge of the ship was the production of the ship's register, by which it appeared

1866

HIBBS v. ROSS.

that the defendant was the registered owner of the ship in question.

It was objected that there was no evidence to fix the defendant, and my Brother Mellor was of that opinion; but in order to avoid the expense of a new trial, he reserved leave to enter a nonsuit, and left to the jury the questions, whether there was negligence in the shipkeeper occasioning the accident, and whether the plaintiff could by due care have avoided the consequences of that negligence. Both of these questions the jury found in favour of the plaintiff. No question was left to the jury as to whether they thought that in fact the defendant was the employer of the shipkeeper, nor was my Brother Mellor asked to leave that question to the jury. A rule nisi was obtained to enter a nonsuit, on the ground that there was no evidence to fix the defendant, which was argued before my Brothers Mellor, Lush, and myself.

I have come to the conclusion that the registry was evidence, which would have justified the jury in finding that in fact the defendant employed the shipkeeper, if that question had been left to them, and consequently that the rule to enter a nonsuit should be discharged; but, under the circumstances, I think the defendant ought to be permitted, if he desires it, to have a new trial, costs to abide the event, in order to have the question of fact more distinctly raised and determined.

I do not think that any liability attaches to the defendant merely as the owner of the ship. The question, I think, is whether he employed the shipkeeper as his servant.

In all cases in which the owners of a ship are sought to be made liable, either in contract for necessaries supplied on the order of the captain, or in cases of collision for the negligence of the crew, or, as in the present case, for the negligence of the shipkeeper, I think that the question really is, whether the persons sought to be charged were the employers of the captain who made the contract, or the masters of the persons who were guilty of the negligence; and that the liability does not depend on the title to the ship. In cases of contract a further question sometimes arises as to whether the shipowner may not have clothed the master with apparent authority, so as to be precluded from disputing his

authority; but in cases of tort the question can only be whether he *in fact* employed those actually guilty of negligence. But whilst agreeing that the ownership of the ship does not render the owners liable either in contract or in tort for the acts of the master and crew, or other persons in charge of the vessel, unless the owners are the employers of those persons, I think that the ownership is a very important piece of evidence, tending to shew that the persons who are proved to be owners of the ship are, in fact, employers of those who have the custody of the ship. Ships are most commonly in the employment of the owners; and consequently proof of ownership is evidence tending to prove that the persons proved to be owners of the ship are employers of those having the actual custody of the ship; and the register being evidence to the title of the ship is, I think, evidence that the registered owners are in possession and employ those having the actual custody. It is by no means conclusive. The ship may be demised (though that is very rarely the case), and the persons navigating her may be employed by the lessee, or by a person who has purchased her but not yet paid the price, and consequently not had the ship conveyed to him, as was the case in *Frost* v. *Oliver* (1); or, as is the most common case, they may be employed by one who is in fact a mortgagor in possession, though the mortgagee is registered as absolute owner. And when the ship is, like the one now in question, not being navigated but laid up in dock, there is the additional possibility that the shipkeeper may be the servant of the dock company, or the ship's broker, or any one else with whom the owners may have made an arrangement to keep his ship for him as a bailee of the ship. But those are all exceptional cases, and the facts lie so entirely in the knowledge of the defendant, and may so easily be proved by him, that I think a jury would be fully warranted in acting on the primâ facie inference that the persons having the actual custody of the ship are employed by the owners, unless some evidence to the contrary is given. The case, in this respect, in principle somewhat resembles those in which it has been held that evidence of possession of demised premises is sufficient proof that the person

(1) 2 E. & B. 301; 22 L. J. (Q.B.) 353.

1866

HIBBS v. ROSS.

in possession is assignee of the lease, in the absence of any evidence of facts tending to shew that he is in possession as sublessee or otherwise: *Doe* v. *Williams* (1); or the cases that establish that, though dealing with the goods of a deceased person is quite consistent with the person who does so being agent for a lawful executor, or claiming the goods as his own, yet, in the absence of anything to explain it, the fact is sufficient to charge the defendant as executor; "for the most obvious conclusion which strangers can form from his conduct is that he hath a will of the deceased wherein he is named executor, but hath not yet taken probate thereof": 2 Black. Com. 507.

If, instead of considering the case on principle merely, we look to the cases decided as to ships, I find none in which it has been held that the title to a ship is not some evidence that the owners were the employers of the person who acts as captain; and several which, as it seems to me, are authorities for saying that it is sufficient primâ facie evidence that they are his employers. At one time it was a common idea that even if it was proved that the owners did not employ the captain, yet the ownership of the ship conclusively made them liable to those who supplied necessaries on the order of the captain. That, it is now established, was a mistake; the persons liable are those who really were the captain's principals when he made the contract, or who have precluded themselves from denying that they were so; but in all the cases on the subject there was evidence that the persons who were on the register as owners were not in fact the employers of the captain. In Abbott on Shipping, 5th ed. p. 18, and 10th ed. by Shee, p. 23, Lord Tenterden states his view of the law thus: "The title to a ship may furnish evidence that repairs are made, or stores furnished under the authority and upon the credit of the legal owner, as in fact they generally are; but it does no more, and therefore if it appears that they were made or furnished under the authority and upon the credit of another, the legal owner will not be answerable." In *Jennings* v. *Griffiths* (2), Lord Tenterden left the case to the jury, using expressions which, though not quite bearing out the statement in the marginal note, seem to me, when taken in conjunction with the above passage, to shew that in Lord Tenderden's opinion

(1) 6 B. & C. 41. (2) Ry. & Mood. 42.

the title to the ship was evidence that the owners employed the captain, and so gave him authority to order necessaries for them, though this evidence might be rebutted. This must be because he is in the control of their ship, and they can explain how that is if he is not their captain. The same principle applies where the person in control is not the captain, but one acting as ship's husband. That was the case in *Fletcher* v. *Reid* (1), and *Cox* v. *Reid*. (2) In *Fletcher* v. *Reid* (1) the plaintiffs rested their case on an admission that necessary repairs to the extent of 540*l*. were done by the plaintiffs to the ship *Asia*, and the bill rendered to one Bulmer, and that the defendants, during the time when the repairs were done, were registered owners, Lord Gifford, after objection, decided that this was sufficient to call on the defendants for an answer. The defendants failed in proving, what it subsequently appeared was the fact, that they were only mortgagees, Bulmer being in fact not their agent but a mortgagor, and the plaintiff obtained a verdict. In *Cox* v. *Reid* (2), a similar action against the same defendants, they were provided with evidence that the transfer to them was only intended to be as to mortgagees, though the then registry acts made it operate in law as an absolute transfer. Best, C.J., told the jury that the owner of a ship is primâ facie liable for repairs, but it was for them to say whether the presumption was not met by the facts of the case, and the defendants obtained a verdict. These were but nisi prius decisions, but no attempt was made to disturb either verdict.

The whole law on this subject was discussed in the two cases of *Frost* v. *Oliver* (3), and *Mitcheson* v. *Oliver* (4), and as these are the latest cases on the subject, and the latter was the decision of a court of error, it is important to see what really was decided in them. In *Frost* v. *Oliver* (3) the question arose on a rule, to set aside the verdict obtained by the plaintiff, for misdirection in leaving the case to the jury at all, on the ground that there was no evidence on which the verdict could be supported, the Court having refused a rule as against the weight of evidence. The evidence, as the Court then took it to be, is reported by Lord Campbell in the beginning

(1) Ry. & Mood. 202 n.
(2) Ry. & Mood. 199.
(3) 2 E. & B. 301; 22 L. J. (Q.B.) 353.
(4) 5 E. & B. 419; 25 L. J. (Q.B.) 39.

1866

HIBBS v. ROSS.

of his judgment. The evidence on the trial of *Mitcheson* v. *Oliver* (1) came before the Court of Exchequer Chamber on a bill of exceptions, and is set out in the beginning of the report of *Mitcheson* v. *Oliver* (1), and was not quite so favourable to the plaintiff as that stated in *Frost* v. *Oliver* (2), though in substance not different. Lord Campbell based his judgment mainly on the ground that the facts were such that Oliver was precluded from denying that Thompson was his captain, even if the jury believed that in fact Thompson was not his captain. The decision of the court of error was that in this he was wrong. Wightman, J., after stating (3) that "The legal title to a ship will furnish primâ facie evidence that repairs are made under *the authority* and for the benefit of the legal owner, but if it appear that they were made under the authority and for the benefit of another, the legal owner will not be answerable," proceeds to state, as the basis of his judgment, that there was in this case evidence of a holding out by the defendant of himself as the beneficial owner, and facts by which he might be understood "to have held Thompson out to the world as his captain." The court of error decided that in *Mitcheson* v. *Oliver* (1) there was no evidence of any such holding forth as *his* captain, but they did not impugn the earlier part of Wightman, J.'s, judgment. Crompton, J., did not base his judgment on this erroneous ground. He states the question to be, whether there was "evidence of any authority on the part of the master to pledge the credit of the defendant by giving the general orders for the supply of the rigging in question." (4) He says: "It does not follow from the ownership or interest in the ship not determining the question of liability, that it is not a material circumstance in ascertaining the question of credit and contract" (5); and he proceeds in a very able and instructive judgment to shew that the plaintiff did make a primâ facie case, though liable to be rebutted; and then asks: "How is the primâ facie case to be rebutted? Surely by proof of all the circumstances by which the contract is proved to have been made with, and the credit given

(1) 5 E. & B. 419; 25 L. J. (Q.B.) 39.

(2) 2 E. & B. 301; 22 L. J. (Q.B.) 353.

(3) 2 E. & B. at pp. 314—15; 22 L. J. (Q.B.) at p. 358.

(4) 2 E. & B. at p. 322; 22 L. J. (Q.B.) at p. 361.

(5) 2 E. & B. at p. 324; 22 L. J. (Q.B.) at p. 362.

to, another, and not to the legal owner; and all the facts on the one side and the other, as to such contract and credit, must be for the jury." (1) He pretty plainly intimates that, in his opinion, the verdict for the plaintiff was against the weight of evidence, but that there was evidence for the jury that in fact Thompson was acting by the defendant's authority. This judgment was certainly not overruled in the court of error, and is in my opinion correct in point of law. Erle, J., who differed from the majority of the Court, does not question that there was primâ facie evidence of authority, but states, as the basis of his judgment (2): "I take it to be a general principle that if direct evidence of the matter to be proved (here of the making of the contract, and of the giving of authority for that purpose) is adduced and believed, the circumstantial evidence, from which the matter to be proved might be inferred in the absence of direct evidence, then becomes immaterial and irrelevant." This the court of error decided to be correct; and I think the only difference between Erle, J., and Crompton, J., was, that the latter thought the rule could not be made absolute in its then shape, because the question whether the rebutting evidence was *believed* could not be withdrawn from the jury, though if the rule had been granted on the ground that the verdict was against the weight of evidence, he should have thought that there ought to be a new trial, because the jury did not believe it.

In *Mitcheson* v. *Oliver* (3) the court of error had to decide on the exceptions taken to the summing up of Lord Campbell as appearing on the bill of exceptions. One of those was, that there was no evidence to go to the jury. As to this, Parke, B., in delivering the judgment of the Court, says (4): "Lord Campbell desires the jury to consider, 'whether upon the evidence upon both sides they were of opinion that the defendant had authorized the goods and work to be supplied and done on his credit, and the goods and work had been supplied and done on his credit.' Taking that as a detached part of the summing up, unaffected by what went before, that is unexceptionable; for, no doubt, if the jury disbelieved the

(1) 2 E. & B. at p. 325; 22 L. J. (Q.B.) at p. 362.

(2) 2 E. & B. at p. 318; 22 L. J. (Q.B.) at pp. 359—60.

(3) 5 E. & B. 419; 25 L. J. (Q.B.) 39.

(4) 5 E. & B. at p. 445.

1866

HIBBS v. ROSS.

facts of the case that made for the defendant, and drew the primâ facie inference from the ownership and other facts, there was evidence on which they might find that Thompson was in fact master for the defendant; and that being so, we cannot agree with the exceptions that there was no evidence to go to the jury."

I do not think that I am entitled to rely upon this as a decision of the court of error, that the ownership alone would be evidence from which, whilst unexplained, the jury might draw a primâ facie inference that the persons actually in the possession of the ship were employed by the owners; for the court of error may have proceeded on the other facts set out in the bill of exceptions; though on examining the statements of the evidence in the bill of exceptions, I find very little more than that Oliver was owner, and was as such in possession both before the orders were given and after the work was completed; but I think I am entitled to rely upon the authority of Crompton, J., and the cases he refers to, as not impeached or shaken by the decision in the court of error. I therefore think that the register was evidence from which, when unexplained, the jury might properly draw the inference that the owner employed the persons actually in charge of the ship; but that it was only evidence quite capable of being explained or rebutted; and therefore the defendant may, if he so elects within a fortnight, have a new trial, costs to abide the event, otherwise I think the rule should be discharged.

My Brother Lush desires me to say that he agrees in this judgment. The rule, therefore, in conformity with the opinion of the majority, will be discharged, unless the defendant elects within a fortnight to take a new trial, costs to abide the event, in which case the rule will be moulded accordingly.

*Rule accordingly for a new trial.* (1)

Attorneys for plaintiff: *Wood & Willicombe.*
Attorneys for defendant: *Marshall, Westall, & Roberts.*

(1) The defendant elected to take a new trial.

SWINFORD *v.* KEBLE.

1866
*June* 13.

*Local Board of Health—Municipal Corporation—Transfer of Powers of one to the other—"Trustees for executing Act for paving," &c.*—20 & 21 *Vict. c.* 50, *s.* 2.

By a provisional order of the General Board of Health, confirmed by 14 & 15 Vict. c. 98, a local board of health was constituted, under 11 & 12 Vict. c. 63, for the parish of St. John, Margate, comprising the town of Margate and a rural district; by the order the rating powers of the board were in the first instance confined to an area conterminous with the town, but power was given to the board from time to time to extend this area, and the members of the board were to be elected by the ratepayers within the rating area for the time being; and the board were made commissioners for executing certain local acts in the town. Afterwards the town of Margate, consisting of the then rating area, was made a municipal corporation by charter. The local board then purported by indenture, under 20 & 21 Vict. c. 50, s. 2, to transfer their powers to the new corporation; and the corporation, as exercising those powers, made an order extending the rating area to the rest of the parish of St. John, and a general district rate was accordingly made on all the rateable property in the parish, as well without as within the town:—

*Held*, that the corporation had no power to make the order and rate in question: for that the transfer by the local board to the corporation was invalid, inasmuch as the local board were not trustees for executing an act for paving, lighting, &c., within the meaning of 20 & 21 Vict. c. 50, s. 2.

SPECIAL case stated without pleadings.

1. The parish of Saint John the Baptist, Margate, in the county of Kent, has an area of about 2500 acres, of which about 1000 acres are within and form the town of Margate, the residue consisting mostly of arable land being without the limits of the town.

2. By a provisional order of the General Board of Health, dated 4th July, 1851, stated to be made in pursuance of the powers vested in the General Board of Health, by the Public Health Act, 1848, 11 & 12 Vict. c. 63, after reciting the various preliminary steps therein mentioned, and that there were certain local acts of parliament in force within the town of Margate, part of the parish of Saint John the Baptist, having relation to the purpose of the Public Health Act, and specifying such acts, and reciting that it appeared to the General Board of Health to be expedient that the Public Health Act, except as thereinafter mentioned, should be applied to the parish of Saint John the Baptist, and that provision should be made with respect to the several local acts of

1866

SWINFORD v. KEBLE.

parliament, and the repeal, alteration, extension, and future execution thereof, and with respect to other matters therein mentioned, the General Board of Health did order and direct:—First, that from and after the day fixed for the first election of a local board of health, as hereinafter mentioned by any act of parliament confirming this present order, the Public Health Act, 1848, and the Public Health Supplemental Act, 1849, and every part thereof, except section 50, and except as hereinafter provided, shall apply to and be enforced within the parish of Saint John the Baptist, and that the said parish shall be and constitute one district for the purposes of the said Public Health Act accordingly: Secondly, provided that none of the rating powers of the said act shall be put in force within any part of such parish that is not included within the boundaries set forth in the schedule B to this order, which rating area may from time to time be extended by the local board by order under the hands and official seal of the board.

3. The above-mentioned order, after making certain provisions with respect to the public highway not included within the rating area, contains the following amongst other clauses:—(5) That the local board of health for the said town of Margate shall consist of thirty persons. (6.) That owners of and ratepayers in respect of such property only in the said parish as is for the time being situate within the rating area shall vote in elections for the local board of health in the town of Margate.

The order then contained various provisions with respect to the local acts therein mentioned, and the repeal, alteration, extension and future execution thereof, ordering and directing amongst other things that the board of health should be the commissioners for executing such parts of the said local acts as were not repealed thereby, and other matters connected therewith.

4. By statute 14 & 15 Vict. c. 98, s. 1, it was enacted that the provisional orders of the General Board of Health referred to in the schedule to that act annexed, should be, and the same were thereby confirmed, so far as they were authorized by the Public Health Act, and such schedule includes Margate. And by the 8th section it is enacted that the first election of the local board of health for the district of Margate, for the purposes of the Public Health Act, should take place on the 17th September, 1851.

5. A local board of health for the town or district of Margate was elected in accordance with the provisions of the provisional order, and the act confirming the same; and boards of health, elected according to the provisions of the Public Health Act, 1848, and the provisional order, continued to act for such town or district until and after the granting a Charter of Incorporation to the Town of Margate, and until the execution of the indenture of the 2nd February, 1858, hereinafter mentioned, the rating area not having been during that time extended under the power in the provisional order.

6. By a charter of incorporation, dated 29th July, 1857, under 1 Vict. c. 78, s. 49, after reciting, as the fact was, that after the passing of the said act, the inhabitant householders of the town of Margate, in the county of Kent, did petition Her Majesty to grant a charter of corporation to the inhabitants of the town of Margate, within the limits defined in the schedule to the order of the General Board of Health, bearing date the 3rd July, 1851, whereby, and by means of the act 14 & 15 Vict. c. 98, the Public Health Act was applied to the said town, within the district set forth in the said order of the General Board of Health, the Queen, therefore, did grant and declare that the inhabitants of the said town of Margate, within the district set forth in the said order of the General Board of Health, and their successors, should be for ever thereafter one body politic and corporate, to be called "The Mayor, Aldermen, and Burgesses of the Borough of Margate," and did extend to the inhabitants of the said town of Margate all the powers and provisions of the Municipal Corporation Act, 5 & 6 Wm. 4, c. 76, and of all acts relating thereto. This charter was duly accepted by the said inhabitants, and election duly had in pursuance thereof, of mayor, aldermen, and councillors, who have since continued to act under the charter.

7. After the granting and acceptance of the above charter, namely, on or about the 2nd February, 1858, by an indenture bearing that date, and purporting to be made between the Margate District Local Board of Health, constituted under the provisions of the Public Health Supplemental Act, 1851, No. 2, and the several local acts, and public acts incorporated therewith of the one part, and the mayor, aldermen, and burgesses, of the town and

1866

SWINFORD v. KEBLE.

borough of Margate, of the other part, after reciting the charter, and the 2nd and 3rd sections of the 20 & 21 Vict. c. 50, entitled, "An act to amend the acts concerning municipal corporations in England," and that at a meeting of the Margate District Local Board of Health duly convened and held, it was deemed expedient, and resolved at the board present at the meeting, that all the rights, powers, estates, properties, and liabilities, of the local board, under the said Public Health Supplemental Act, 1851, No. 2 (14 & 15 Vict. c. 98), and the several local acts and public acts incorporated therewith, should be transferred to the corporation of Margate. It is witnessed that the local board did transfer unto the mayor, aldermen, and burgesses of the town and borough of Margate, and their successors, all the rights, powers, estates, properties, and liabilities of the local board, under the said several acts, to the intent that after the execution of the indenture the mayor, aldermen, and burgesses, and their successors and assigns, should and might become trustees for executing, by the council of the town and borough, the several powers and provisions of the said several acts, and that all the rights, powers, estates, and property, then vested in the local board, should and might vest in the mayor, aldermen, and burgesses, and their successors, and all the liabilities and obligations of the local board should stand transferred to, and be borne by, the mayor, aldermen, and burgesses, and their successors, and that the local board should, and might henceforth, be freed and discharged from all such liabilities and obligations.

8. This indenture was duly signed and sealed with the seal of the local board, and was also sealed with the common seal of the mayor, aldermen, and burgesses, and signed by the mayor.

9. After the execution of the above indenture, the local board of health ceased to act, and there has not since that time been any election of members of the board by the ratepayers of any portion of the parish, either within or without the rating area defined in the schedule to the provisional order, now forming by virtue of the same charter the incorporated borough of Margate; but the mayor, aldermen, and burgesses of the town and borough of Margate, by their common council, have alone acted as such

board of health, and as trustees or commissioners for the execution of the said several local acts.

10. On the 31st of May, 1864, the mayor, aldermen, and burgesses made an order sealed with their common seal, and signed by the then mayor, by which they, acting by the council of the borough as the local board of health for the district of Margate, in exercise of the power in this behalf vested in them under the provisional order of the General Board of Health constituting such district, dated the 4th day of July, 1851, and the act of parliament confirming the same, and of every other power in anywise enabling them in this behalf, do order, that from and after the making of this order, the rating area mentioned and described in schedule B. to the provisional order shall be extended to the whole of the parish of Saint John the Baptist, Margate, being the district constituted by the said provisional order for the purposes of the Public Health Act, 1848.

11. After the making of the above order, the common council of the borough made a general district rate for the purposes of the Public Health Act on all property within the parish of Saint John the Baptist, Margate, assessable to the rates for the relief of the poor. The plaintiff, being the owner and occupier of property in the parish, but out of the limits of the borough and town of Margate, and without the boundaries set forth in the schedule B. to the provisional order, was duly assessed in such general district rate, if the common council had power to make such rate on such property.

12. The plaintiff refused to pay such rate, contending that the common council had no such power, whereupon for enforcing payment a distress warrant was obtained, and a chattel of the plaintiff on the property so assessed was seized by or by the orders of the defendant.

The question for the opinion of the Court was, whether the common council of the borough had power to make and levy such rate upon the plaintiff, as the occupier of such property in the said parish of Saint John the Baptist, Margate, out of the limits of the borough and town of Margate.

If the Court should be of opinion in the affirmative, judgment of nolle prosequi, with costs of defence, was to be entered up for

1866

SWINFORD v. KEBLE.

the defendant. If the Court should be of opinion in the negative, judgment was to be entered up for the plaintiff for 40*s.* and costs of suit.

June 1. *Bovill, Q.C.* (*Tomlinson* with him), for the plaintiff. The rate was made without jurisdiction: the powers of the local board have not become legally vested in the corporation. By 11 & 12 Vict. c. 63, ss. 12 and 13, and clause 6 of the order itself, the local board could only be elected by the ratepayers in the rating area; but by s. 33, as amended by 21 & 22 Vict. c. 98, s. 26, on a town becoming a corporate borough after a local board has been elected, the corporation becomes the local board, only if the *district* be conterminous with the limits of the new borough, which is not the case in the present instance. Neither can the corporation rely on 20 & 21 Vict. c. 50, s. 2 (1), as the local board, were not trustees for the execution of local acts within the meaning of the enactment, so as to be able to transfer, as they purported to do, their power to the corporation.

*Manisty, Q.C.* (*Watkin Williams* with him), for the defendant. The corporation do not rely on the Public Health Acts, but on the Municipal Corporation Act, 20 & 21 Vict. c. 50, s. 2. That act, after repealing s. 75 of the 5 & 6 Wm. 4, c. 76, by s. 2 (1), enables trustees, acting under any act for paving, watching, and regulating any borough to which a charter shall be granted, to transfer their powers to the new corporation. By s. 8, the act and the original act, 5 & 6 Wm. 4, c. 76, are to be read together; and by s. 142 of the latter act, "trustees" shall be construed to mean "trustees, commissioners, or directors, or the persons charged with the execution of a trust or public duty, by whatever name they are designated." This, contrasting the language used in the present section with the language of the repealed section 75 of the old act, shews that the local board of health are trustees within the meaning of the enactment.

*Bovill, Q.C.*, in reply. *Cur. adv. vult.*

June 13. The judgment of the Court (Blackburn, Mellor, and Shee, JJ.), was delivered by

BLACKBURN, J. We have come to the conclusion that the

(1) Section 2 of the 20 & 21 Vict. c. 50, is set out in the judgment.

common council of the borough of Margate had not power to make the rate in question, and consequently judgment must be entered, according to the agreement of the parties, in favour of the plaintiff for 40*s.* and costs.

The question depends on the construction of the 20 & 21 Vict. c. 50, which (by s. 8) is to be construed along with the 5 & 6 Wm. 4, c. 76. The first section of the 20 & 21 Vict. c. 50, repeals, and the 2nd section, with some alterations, re-enacts the 75th section of the 5 & 6 Wm. 4, c. 76. By this enactment "the trustees, acting under any act for paving, lighting, supplying with water or gas, or cleansing, watching, regulating, or improving, or for providing or maintaining a cemetery or market, in and for any borough (whether mentioned in the schedule to the 5 & 6 Wm. 4, c. 76, or subsequently incorporated under that act or otherwise), or any part of such borough, and whether the powers of such trustees do or do not extend beyond the limits of such borough, may by indenture duly made transfer to the body corporate of such borough their powers, property, and liabilities; the body corporate of such borough shall, on such transfer being made, be the trustees, by the council of such borough, for carrying any such act into operation; and all the property of the trustees shall vest in the body corporate of the borough, and all the liabilities shall be borne by the body corporate from the time of the transfer."

The interpretation clause, section 142 of the 5 & 6 Wm. 4, c. 76, defines "trustees" to mean "trustees, commissioners, or directors, or the persons charged with the execution of a public trust or duty by whatever name they are designated."

The facts are, that by a provisional order confirmed by act of parliament, a local board of health was constituted for the parish of Saint John the Baptist, Margate, Kent, comprising the town of Margate and also a rural district, but by the terms of the order their rating powers were in the first instance confined to an area conterminous with the town, though power was given them from time to time to extend the rating area so as to bring into it the rest of the district, and the members of the local board were to be elected by the ratepayers within the rating area for the time being. Then the town of Margate was incorporated. At this time, therefore, the local board of health were elected by the

1866

SWINFORD v. KEBLE.

inhabitants of a rating area co-extensive with the new borough, though the district over which they might extend their powers was more extensive. They professed by indenture to transfer their powers to the corporation of the borough, which has subsequently sought to extend its powers to the rural parts of the district. And the question, whether the municipal corporation can thus extend their powers over the rural parts of the district, depends on the question whether the transfer to them of the powers of the local board of health was valid, and that again depends on this, whether a local board of health for a district comprising a borough are trustees for executing an act for paving, &c., within the meaning of 20 & 21 Vict. c. 50, s. 2, and we think they are not. There is no doubt that the duties of the local board of health imposed by the General Public Health Acts comprised many of the duties enumerated in the enactment in question, and the general course of legislation has been by a provisional order confirmed by act of parliament to transfer to the local board of health the powers of all trustees for executing local acts of that description within their district, so that local boards of health are charged with the execution of a public trust or duty and are acting under the Public Health Acts, and the acts confirming the provisional orders under which they are created; and these acts may in one sense be said to be acts for the purposes mentioned in the 2nd section of the 20 & 21 Vict. c. 50. But we think that they are not such acts as were intended by the legislature. The whole scheme of the Public Health Act, 11 & 12 Vict. c. 63, is to transfer all powers of this kind to a local board where there is one. By section 12, if the district either is or becomes co-extensive with a borough, the council of that borough are the local board, but the local board of health and the municipal corporation are kept distinct, so that the borough fund is not liable to the creditors of the local board; if the district consists partly of a borough the local board are to consist partly of members of the council. And by section 33, if the district become entirely comprised within a borough and a day is named in the charter of incorporation for that purpose, the powers of the persons then forming the local board are to be transferred to the council of the borough; there is no similar provision applicable to the case

of part of the district being brought within a borough. Now we cannot think that the legislature intended by the 20 & 21 Vict. c. 50, s. 2, to give to a local board, part of whose district lies within a borough, power to reverse the whole of this legislation, and to charge the municipal corporation with the duty of carrying the Public Health Act into execution, so as on the one hand to charge the borough fund with all the liabilities of the local board of health, and on the other to deprive the ratepayers of the rural part of the district of all share in the election of those who are to govern them. We think, therefore, we must, in order to effectuate the intention of the legislature, construe the section as applying only to bodies charged with the duty of executing local and personal acts of the kind mentioned in the enactment, and this was no doubt what was meant.

Our attention was called to the 21 & 22 Vict. c. 98, s. 26, which certainly is strangely framed, as it declares that a transfer made by any local board of health to the council of a corporate borough, "the district of such board and such corporate borough being identical," shall be valid and effectual though no day shall have been named for such transfer in the charter of incorporating such borough. Now in cases within the 33rd section of the Public Health Act, 1848, no transfer is made by the local board; and if the transfer was supposed to be made under the municipal corporation acts, the absence of the naming of a day in the charter of incorporation is quite immaterial. But though it is very difficult to say what was meant, it is clear that this enactment cannot extend to the present case, in which the districts are not identical. We regret to be obliged to decide thus, as we are sensible that the consequence must be that the affairs of the district will be thrown into a state of confusion, which may probably render it indispensable to apply for a local act to set things right; but this we cannot help.

*Judgment for the plaintiff.*

Attorneys for plaintiff: *Hawkins, Bloxam & Co.*
Attorneys for defendant: *Duncan & Morton.*

1866
*May* 26.

## THE QUEEN *v.* FARRER AND ANOTHER, JUSTICES OF THE COUNTY OF DORSET.

1 QBD. 200

*Highways*—25 & 26 *Vict.* c. 61, s. 19—*Disputed Highway*—*Liability to repair admitted*—*Jurisdiction of Justices to order Indictment.*

Section 19 of the 25 & 26 Vict. c. 61, enacts:—"When on the hearing of any summons respecting the repair of any highway the liability to repair is denied by the waywarden on behalf of his parish, or by any party charged therewith, the justices shall direct an indictment to be preferred at the next assizes or at the next quarter sessions for the county, &c., wherein such highway is situate, against the inhabitants of the parish or the party charged therewith for suffering the said highway to be out of repair":—

*Held*, that the jurisdiction of justices under this section is limited to admitted highways; and that justices have no jurisdiction to order an indictment to be preferred where it is bonâ fide denied by the parties charged that the road is a highway, and the liability to repair the road, if it is a highway, is not denied.

MANDAMUS to O. W. Farrer and another justice for the county of Dorset. After reciting that the petty sessions for the highways holden in Wareham, in the said county, in and for the petty sessional division of Wareham, on the 26th of April, 1864, two summonses, the one addressed to the highway board of "The Wareham highway district," and the other to the waywarden of the parish of Bere Regis, and issued in pursuance of 25 & 26 Vict. c. 61, s. 18, came on to be heard before the justices, and that they were required on behalf of the prosecutor to receive evidence upon and hear and determine the matter of the two summonses, or to direct an indictment to be preferred and the necessary witnesses in support thereof to be subpœnaed at the next assizes, or at the next quarter sessions for the said county, in pursuance of the summonses and the provisions of the said statute, but that the justices dismissed the same without hearing and determining the merits thereof, the writ commanded the defendants at the next petty sessions for the highways for the said division to receive evidence upon and hear and determine the matter of the two summonses, or to shew cause why the defendants should not, in pursuance of section 19 of the said act, and the two summonses, direct a bill of indictment to be preferred against the inhabitants

of the parish of Bere Regis, in respect of a certain highway mentioned in the summonses as being out of repair, &c., and the necessary witnesses in support thereof to be subpœnaed at the next assizes, or at the next quarter sessions for the said county within which the highway is situate.

Return, stating that at the hearing it was alleged by the prosecutor, and admitted by the highway board and waywarden, that the summonses related to a part of a road called "Hyde Road," situate within the parish of Bere Regis, and that the same was out of repair, and that the parish of Bere Regis was included in the Wareham highway district; that it was alleged on behalf of the prosecutor, but denied by the waywarden of Bere Regis on behalf of the parish, that the road was a common highway, &c.; and that the liability to repair the road, if the same had been a highway, was not denied by the waywarden on behalf of the parish; and that it was admitted by the prosecutor that the denial of the waywarden was made bonâ fide, and that the only question then before the justices was, whether the road was a common highway or not. That evidence was tendered by the prosecutor to prove the road a highway. That the justices in pursuance of sections 18 and 19 of 25 & 26 Vict. c. 61, did hear and determine the matter of the two summonses regarding the state of the road, and the liability of the party charged with the repair of the same; but finding on the hearing that the summonses did not relate to an admitted highway, nor were in respect of any denial of a liability to repair an admitted highway, nor that the liability to repair the road as an admitted highway was then denied by the waywarden on behalf of the parish of Bere Regis, the justices did not direct an indictment to be preferred, and the necessary witnesses in support thereof to be subpœnaed under section 19, nor did they receive or hear evidence in support of the road being a highway, or proceed to determine the question of the road being a highway, as they are not, as such justices, directed or empowered by section 19, to hear any evidence upon or determine the question of a road being a highway, or to direct an indictment to be preferred under the above circumstances, and where the fact of a road being a highway is the only matter denied, but the liability to repair an admitted highway is not denied on behalf of the parish.

1866

THE QUEEN v. FARRER.

Demurrer to the return, and joinder. (1)

*Coleridge, Q.C.* (*H. James* with him), in support of the demurrer. The question is, whether, under section 19 of 25 & 26 Vict. c. 61, before the justices can refuse to direct an indictment to be preferred against a parish, they ought not to determine whether the

(1) The following sections of 25 & 26 Vict. c. 61, are material:—

s. 18. "Where complaint is made to any justice of the peace that any highway within the jurisdiction of the highway board is out of repair, the justice shall issue two summonses, the one addressed to the highway board, and the other to the waywarden of the parish, liable to the repair of such highway, requiring such board and waywarden to appear before the justices at some petty sessions in the summons mentioned to be held in the division where such highway is situate; and at such petty sessions, unless the board undertake to repair the road to the satisfaction of the justices, or unless the waywarden deny the liability of the parish to repair, the justices shall direct the board to appear at some subsequent petty sessions to be then named, and shall either appoint some competent person to view the highway and report to them on its state at such other petty sessions, or fix a day previous to such petty sessions, at which two or more of such justices will themselves attend to view the highway. At such last-mentioned petty sessions, if the justices are satisfied, either by the report of the person so appointed, or by such view as aforesaid, that the highway complained of is not in a state of complete repair, it shall be their duty to make an order on the board, limiting a time for the repair of the highway complained of: and if such highway is not put into complete and effectual repair by the time limited in the order, the justices in petty sessions shall appoint some person to put the highway into repair, and shall by order direct that the expenses of making such repairs, together with a reasonable remuneration to the person appointed for superintending such repairs, and amounting to a sum specified in the order, together with the costs of the proceedings, shall be paid by the board; and any order made for the payment of such costs and expenses may be removed into the Court of Queen's Bench in the same manner as if it were an order of general or quarter sessions, and to be enforced accordingly."

s. 19. "When on the hearing of any such summons respecting the repair of any highway the liability to repair is denied by the waywarden on behalf of his parish, or by any party charged therewith, the justices shall direct a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpœnaed at the next assizes to be holden in and for the said county, or at the next general quarter sessions of the peace for the county, riding, division, or place wherein such highway is situate, against the inhabitants of the parish or the party charged therewith, for suffering and permitting the said highway to be out of repair; and the costs of such prosecution shall be paid by such party to the proceedings as the Court before whom the case is tried shall direct, and if directed to be paid by the parish, shall be deemed to be expenses incurred by such parish in keeping its highways in repair, and shall be paid accordingly."

road alleged to be out of repair is or is not a highway. The justices ought to have determined this; they have not, and therefore the return is bad. It is admitted that if the justices are satisfied that the road is not a highway they have no jurisdiction to order an indictment, but like all inferior tribunals they must inquire into the facts which give them jurisdiction. Mere denial, though bonâ fide, is not enough.

[COCKBURN, C.J. Does not the whole of the legislation under sections 17, 18 and 19 of 25 & 26 Vict. c. 61, refer to admitted highways? Sections 94 and 95 of 5 & 6 Wm. 4, c. 50, are in pari materia with those sections.]

The later act was passed to enlarge the jurisdiction of justices. There are several decisions on section 95 of 5 & 6 Wm. 4, c. 50, which shew that the highway must be a highway to give the justices jurisdiction, and they go no further. In *Reg.* v. *Arnould* (1), it is laid down that if the road be a highway, and the liability to repair is denied, the justices are bound to order an indictment.

[BLACKBURN, J. There the case is brought within the very words of section 95. It was admitted that the road was a highway, but the duty or obligation to repair was denied; here it is denied that it is a highway, and the liability to repair it, if it be a highway, is admitted.]

*Ex parte Bartlett* (2) shews that, in order to give the justices jurisdiction, two facts must co-exist—that the road is a highway, and that it is out of repair; as to the want of repair, a particular mode of inquiry is given; it is to be ascertained by the justices in person, or the surveyor; but the other question is also a fact which must be ascertained by the justices to give them jurisdiction. *Reg.* v. *Askerton* (3) seems to shew that, if it be alleged on one side that the road is a highway, and denied on the other, the justices ought to hear evidence and decide the question.

[MELLOR, J. There the justices heard no evidence at all; here it appears that there was enough to satisfy them that there was a bonâ fide dispute as to whether the alleged highway was a highway or not.]

(1) 8 E. & B. 550; 27 L.J. (M.C.) 92.
(2) 30 L. J. (M.C.) 65.
(3) 5 New Rep. 305; reported nom. *Reg.* v. *Johnston*, 34 L. J. (M.C.) 85.

1866

THE QUEEN v. FARRER.

It is not enough that there should be a bonâ fide dispute; the justices must go further, and satisfy themselves whether the road is or is not a highway, for *Reg.* v. *Heanor* (1) is also in favour of the applicant, which shews that jurisdiction ultimately fails unless the road be a highway. In *Williams* v. *Adams* (2) it was decided that on an information for placing rubbish on an alleged highway, under section 73 of 5 & 6 Wm. 4, c. 50, the justices were bound to determine whether the alleged highway was a highway or not.

[MELLOR, J. Because, as observed by Crompton, J., the very foundation of the justices' jurisdiction depended on the question.]

So under section 19 of the later act, they have no jurisdiction if the alleged highway be not a highway, and therefore they ought to ascertain that fact. This is not like cases in which, if a question of title is raised, the magistrates' jurisdiction is ousted. In such cases the only question would be, was the defence bonâ fide raised? *Brown* v. *Evans* (3); *Reg.* v. *Cridland.* (4) In the present case, whether the alleged highway be a highway or not, is a fact necessary to be ascertained to give jurisdiction, and before the justices can proceed or refuse to proceed to order an indictment, they must find that fact.

*Maule*, contrà. The return is good. It states that the justices did hear and determine the matter of the two summonses, so that on the question of jurisdiction they have decided that there was a bonâ fide dispute as to whether the alleged highway was a highway or not. *Reg.* v. *Askerton* (5) decides that if the surveyor denies the liability of the parish to repair, on the ground that the alleged highway is not a highway, the justices cannot order an indictment. Reading section 19 by the light of that decision, the justices are right in not ordering an indictment in the present case. The statute does not oust the common law remedy of indicting a parish if a highway in it is out of repair; the main object of the statute was to relieve persons from the necessity of preferring an indictment, and to give them a speedier mode of proceeding; it only applies to those cases where it is admitted

(1) 6 Q. B. 745.
(2) 31 L. J. (M.C.) 109; 2 B & S. 312.
(3) 34 L. J. (M.C.) 101.
(4) 27 L. J. (M.C.) 28.
(5) 5 New Rep. 305; 34 L. J. (M.C.) 85.

that the road is a highway, but the liability to repair is denied; at common law, if the road be a highway, the parish are liable to repair it, and where the parish admit it is a highway, but allege a third person is liable to repair it, then the justices have jurisdiction to order an indictment to try the question of liability. No doubt, on the trial of the indictment, the other question, whether the alleged highway is a highway or not, is sometimes raised; and if it turn out that it is not a highway, the prosecutor does not get any costs, because the costs would be payable out of the highway rate: *Reg.* v. *Heanor.* (1) A denial of the liability to repair, means a denial of some liability as to the repairs which the parish have to make. Suppose the issue before the justices on a summons, to be highway or no highway, or a denial of the liability on the part of the parish to repair, on the ground that it is no highway, that is a case not contemplated by the statute; it is not a highway, and this issue ought not to be raised at the expense of the parish, but at the risk of the private individual seeking to impose the liability on the parish. *Ex parte Bartlett* (2), which was a decision on section 95 of 5 & 6 Wm. 4, c. 50, is in point for the defendants. Hill, J., in that case was of opinion that section 95 only applies to cases of admitted highways. The justices, by not making the order, do not prevent the applicant from preferring an indictment. Under the later act, the applicant has still less cause of complaint, as it would appear that the costs of the prosecution, under section 19, are in the discretion of the Court.

[BLACKBURN, J. The words in the earlier act are "duty or obligation," in the later act "liability to repair." Are the sections of the earlier act repealed?]

Sections 94 and 95 are not repealed, but by section 42 of 25 & 26 Vict. c. 61, the two acts, so far as they are consistent, are to be read together. Substantially the language of the two acts is the same. It is clear that the duties imposed on justices by section 94 of 5 & 6 Wm. 4, are limited to admitted highways; section 95 is in aid of the previous section, and must also be confined to admitted highways; and so sections 17, 18, and 19 of 25 & 26 Vict. c. 61, which are in substitution of sections 94 & 95 of the former act, only relate to admitted highways; the justices,

(1) 6 Q. B. 745. (2) 30 L. J. (M.C.) 65.

1866

THE QUEEN v. FARRER.

therefore, had no jurisdiction to order an indictment to be preferred.

*Coleridge, Q.C.*, in reply.

COCKBURN, J. I think that the return to the mandamus is sufficient and that therefore the demurrer must be overruled. I own I am of opinion that the legislation which we are called upon to consider is not intended to apply to the case of a disputed highway. I cannot think that the legislature in giving justices a summary jurisdiction to compel the proper parties to put a highway into repair when it is out of repair, intended to substitute this summary jurisdiction for that of a jury, to try the question whether the road was a highway or not. I cannot but think that the summary jurisdiction created by the statute was intended to be confined to cases in which there is no dispute as to the fact of the road being a highway, but the only question is, whether the highway needs repair. If it is shewn to the justices that a highway is out of repair, and that it is necessary for the convenience of the public that it should be repaired, it is a matter into which they have jurisdiction to inquire; and it seems to me, if the highway is out of repair, they must make an order on the proper persons to repair it; but if on the inquiry the liability to repair is denied, the justices must order an indictment to be preferred, but where it is disputed that the alleged highway is a highway, the justices have no jurisdiction to order an indictment. It is important to ascertain what the purpose of the mandamus is; it is in truth to compel the justices to make the necessary order for preferring an indictment against the parish for the non-repair of a highway. We must therefore look at the words of the statute, and see under what circumstances it is that the justices can be called upon to make such an order. Now, it appears that not only must the alleged highway be admitted to be a highway, but the liability to repair on the part of the parish sought to be charged must be denied. Assume, then, that in the case in question the way is a highway, either admitted to be so or found to be so from the evidence which the justices may have heard, assuming they had the power, what construction are we to put on the words "duty or obligation" contained in section 95 of 5 & 6 Wm. 4, c. 50, or

rather on the word "liability" contained in section 19 of the later act? I think those sections pre-suppose the existence of a highway, and a liability on the part of some one to repair it; and,—if only the liability to repair on the part of the parish is disputed, on the only grounds on which it can be disputed, that some corporation is bound to repair it, or that some person is bound to do so ratione tenuræ, or that the road has been dedicated without all the formalities of a dedication having been observed,—that the justices could order an indictment to be preferred. Here, however, it is quite plain that there is no dispute as to any liability on the part of the parish to repair the road in question, if it be a highway. I think Mr. Maule has well explained why it is that the legislature have made the parish liable for costs in cases in which an indictment is ordered to be preferred for the non-repair of a highway. The prosecutor is entitled as one of the public and on the part of the public, if it appears that the road is a highway and is out of repair, to insist on its being put into repair. Primâ facie, he is perfectly right to apply to the parish on whom the common law casts the liability. If the parish seek to get rid of their liability on the ground that some one else is liable, it is reasonable and just that the question should be tried at their expense. Therefore, when the statute gives the justices a summary jurisdiction to enforce the repair of a highway which is out of repair, by the orders which they are authorized to make under sections 18 and 19 of the 25 & 26 Vict. c. 61, I can quite understand that the legislature should say: "This road being a highway, and being out of repair, and primâ facie the parish against which proceedings are taken being liable to repair it, but that liability being disputed on the ground that some one else is bound to repair it, and therefore the person instituting the proceedings being called upon to try the question by indictment, the costs of that indictment shall fall on the parish seeking to get rid of their common law liability." *Reg.* v. *Heanor* (1), instead of being an authority in favour of the prosecutor's contention, is opposed to it, for in that case the Court decided that the costs of the indictment could not be fixed on the parish. Why? Because the jury by their verdict had found that the road was not a highway and never had been a

(1) 6 Q. B. 745.

1866

THE QUEEN v. FARRER.

highway, and therefore the justices had no jurisdiction to order an indictment to be preferred. Besides that case, there is the more recent decision of *Ex parte Bartlett* (1), in which Hill, J., pronounces an opinion on this very question; and I own I am always too happy to be able to fortify my own opinion by anything that has fallen from that most eminent and learned judge. He says: "Sections 94 and 95 apply only to cases of admitted highway. In order to give the justices jurisdiction to make the order the road must be a highway, and it must be out of repair; the latter fact is to be ascertained by the justices in person or by sending a surveyor; and if the highway be found out of repair and the liability to repair is denied, the justices are then to order an indictment to be preferred. But if the two facts do not co-exist, the justices have no jurisdiction to direct an indictment." That is, if the road is admitted to be a highway and the question of liability to repair is denied, then the justices are to order an indictment to be preferred. I think that is the true explanation of this legislation, applicable as much to one statute as to the other, and consequently under the circumstances of this case the justices would not be justified in ordering the indictment to be preferred. And therefore, in setting forth those facts on the return, though it may appear from some part of it the justices may possibly be in error (on which I pronounce no opinion) in declining to exercise jurisdiction, I think they have stated quite sufficient to entitle them to the judgment of the Court.

BLACKBURN, J. I am also of opinion that the return is good, and that consequently our judgment must be for the defendants. The question turns on the construction of sections 18 and 19 of the new highway act, 25 & 26 Vict. c. 61; and the construction of these sections depends upon the construction of sections 94 and 95 of 5 & 6 Wm. 4, c. 50, which are not repealed, but which are in effect re-enacted, with some slight alteration, in the later act, and the two acts are to be construed together. The object which the legislature had in passing these enactments appears to be this: when a public highway in a parish is out of repair, the public have a right to have it repaired, and, unless in very exceptional cases, as when a road has been dedicated since the passing of 5 & 6

(1) 30 L. J. (M.C.) at p. 66.

Wm. 4, c. 50, without a proper certificate, in which case the parish is not bound to repair it, the only remedy at common law against the parish is by indictment;—the intention of the legislature, therefore, was, when a highway is out of repair, that the public, instead of having recourse to the common law remedy by indictment, should have a summary remedy against the person bound to repair it, and for that purpose jurisdiction is given to justices under sections 94 and 95 of 5 & 6 Wm. 4, c. 50, to compel the repair of a highway. The law with regard to the jurisdiction of the justices under these sections is explained in *Ex parte Bartlett.* (1) Now, the general rule of law is, that where a summary jurisdiction is given to justices, they cannot decide upon a question of title, unless there be something to indicate that it was the intention of the legislature that they should in such a case exercise jurisdiction. There are cases, as in *Williams* v. *Adams* (2), in which the duty imposed upon justices by a statute involves the determination of a question of title, and they must then decide the question of title before they can exercise any jurisdiction; but the general rule is, that justices have no jurisdiction when a question of title is bonâ fide in dispute.

Under section 19 of 25 & 26 Vict. c. 61, the justices have only jurisdiction to order repairs by persons liable to repair, but they have not entrusted to them any jurisdiction of determining whether the road be a highway or not. The liability to repair may involve a question of title. The legislature, in section 94 of 5 & 6 Wm. 4, c. 50, give the justices summary jurisdiction to convict persons liable to repair the highway, if it be out of repair, and to order them to repair it, and provide for the manner in which such repairs are to be done; and upon the true construction of the statute, if there was nothing more, I should have said if it was bonâ fide disputed that the alleged highway was a highway, or that the persons called upon to repair were liable, that these were matters of right and title, and that the justices must hold their hands. Then at the end of section 94 there comes this proviso: "that the justices shall not have power to make such order as aforesaid in any case where the duty or obligation of repairing the highway comes into question." Whether it is meant

(1) 30 L. J. (M.C.) 65. (2) 31 L. J. (M.C.) 109.

1866

THE QUEEN v. FARRER.

that the justices shall have no power to convict as well as to make an order to repair, I do not inquire; the grammatical meaning of the words would be, no power to make an order to repair only, but the common sense meaning would be, no power to make an order or convict. Now, no doubt the duty and obligation of repairing the highway in one sense may be said to come into question when the alleged highway is denied to be a highway; but I think the legislature intended by the proviso to confine the operation of the section to admitted highways only. The proviso is inserted for the purpose of introducing section 95, which is, "If on the hearing of any such summons respecting the repair of any highway, the duty or obligation of such repairs is denied by the surveyor, then the justices may order an indictment." I think, bearing in mind the object of the legislature, it is clear what is meant by this section is, when an admitted highway is out of repair, and the duty or obligation to repair it is denied, then only can the justices order an indictment. And this is the opinion of Hill, J., in *Ex parte Bartlett* (1); that case may be not precisely in point, but the dictum of that very learned and accurate judge is entitled to great weight. Then comes section 19 of 25 & 26 Vict. c. 61, in which the language is different; in the first act it is "duty or obligation," in the later act "liability"; though the words are changed, I think the meaning is the same, and that the same construction must apply.

MELLOR, J. I am entirely of the same opinion. I think that the return does sufficiently shew a good reason why the justices did not proceed to make the order. It certainly appears to me, when we consider the words of the various sections bearing on the question, that the object of the legislature must have been this: where it is disputed that the road is a highway, the prosecutor must proceed in the ordinary manner to enforce the repair of the highway by indictment, for the statutes do not take away the power of any person to prefer an indictment; but if the parish admit the road to be a highway and deny their liability to repair it, because some one else ought to repair it ratione tenuræ, or for some other cause, then I think the justices are bound to make an order directing an indictment to be preferred. I think *Reg.* v. *Heanor* (2), which was

(1) 30 L. J. (M.C.) 65. (2) 6 Q. B. 745.

a decision on section 95 of 5 & 6 Wm. 4, c. 50, instead of supporting the prosecutor's argument bears the other way; that case shews that where the road is not a highway, the justices have no jurisdiction to order an indictment, and the prosecutor, therefore, who fails at the trial on the ground that the road out of repair is not a highway, is not entitled to have his costs paid out of the highway rates. In the later act, 25 & 26 Vict. c. 81, the words of section 19 are different from section 94 in 5 & 6 Wm. 4, c. 50, as pointed out by my Brother Blackburn. The words of section 19 are: "When on the hearing of any such summons respecting the repair of any highway the liability is denied by the waywarden on behalf of his parish," then certain proceedings are to take place. If the legislature had intended not to limit the jurisdiction to admitted highways only, the section would have contained the words "if the fact of its being a highway is disputed, or the liability to repair is denied." The former words are not to be found in the section. If the section had contained them, the argument urged by Mr. Coleridge would have prevailed. I agree with my Lord and my Brother Blackburn that the return is sufficient.

SHEE, J. I am of the same opinion. I will not repeat what has been said by my Lord and my learned Brothers; but it appears to me that the return which the justices have made to this mandamus is a good return. They return, We have not directed an indictment because our jurisdiction under section 19 of 25 & 26 Vict. c. 61, is confined to cases of undisputed highways, and to cases in which the liability only to repair, of the party sought to be charged therewith, is disputed. During the course of the argument I had some doubts arising upon the construction of sections 94 and 95 of 5 & 6 Wm. 4, c. 50; but I think the alteration of the wording in section 19 of 25 & 26 Vict. c. 61, tends strongly to support the view the Court are taking of the construction of that section. Under the former act the justices were required not to make an order where the duty or obligation of repairing a highway came into question; where the duty or obligation of making such repairs was denied by the surveyor on behalf of the parish, then they were to direct a bill of indictment to be preferred. Now it was the duty, except under special circumstances, of the surveyor of the

1866

THE QUEEN v. FARRER.

highways to see that the highways in the parish were kept in repair; and it may well have been doubted, as in fact it was doubted in several cases to which our attention has been directed whether the words, "duty or obligation to repair," did not include the question highway or not highway, as well as the question of liability to repair a highway. The cases of *Reg.* v. *Surrey* (1), *Reg.* v. *Heanor* (2), and *Ex parte Bartlett* (3), put the construction upon the statute of 5 & 6 Wm. 4, c. 50, that the jurisdiction of the justices was confined to cases in which the fact of a highway was admitted, and the person charged denied his liability to repair the highway. When the later statute was passed the words were changed, as it seems to me to make the doubt which had arisen on the former statute less likely to arise again. Instead of the words "duty or obligation" to repair, in section 95 of 5 & 6 Wm. 4, c. 50, the word "liability" is used in section 19 of 25 & 26 Vict. c. 61; therefore the jurisdiction of the justices to order an indictment being thereby more clearly confined to cases in which the way is admitted to be a highway, and the liability only to repair disputed. It appears to me that the return to the mandamus is good.

*Judgment for the defendants.*

Attorney for prosecution: *G. A. James.*

Attorneys for defendants: *Bell, Steward, & Lloyd.*

(1) 21 L. J. (M.C.) 195. (2) 6 Q. B. 745. (3) 30 L. J. (M.C.) 65.

## LLOYD *v.* JACKSON AND ANOTHER.

1866
June 13.

*Will—Devise without words of inheritance—When it gives an estate in fee simple—Introductory words "as touching such worldly estate wherewith it hath pleased God to bless me"—Words "freely to be possessed and enjoyed"—"All my children to be educated and settled in business according to my wife's discretion."*

A testator by will made before the Wills Act devised thus:—"As touching such worldly estate wherewith it hath pleased God to bless me in this life, I give and bequeath to my wife, whom I likewise constitute my sole executrix, all and singular my lands, messuages, and tenements, by her freely to be possessed and enjoyed, together with all my houses and household goods, deeds, and moveable effects, all my children to be educated and settled in business according to my wife's discretion":—

*Held*, that the last clause indicated an intention that the wife should take such an estate as would enable her to carry out the wishes of the testator, and that she therefore took an estate in fee, and not merely a life estate, which was all that the prior words of the will standing alone would have given her.

EJECTMENT for premises, situate in the parish of Fishguard, in the county of Pembroke.

Samuel Lloyd and Thomas Lloyd, two of the defendants appeared to the writ, and defended for the whole of the premises.

At the trial before Blackburn, J., at the last Pembrokeshire spring assizes, the plaintiff claimed to be entitled as heir-at-law of his father, Ebenezer Lloyd. The defendants, who were also sons of Ebenezer Lloyd, claimed under the will of their mother, Mary Ann Lloyd, who they alleged took an estate in fee under Ebenezer Lloyd's will.

The will was as follows: "I, Ebenezer Lloyd, do make and ordain this my last will and testament, that is to say . . . .; and as touching such worldly estate wherewith it hath pleased God to bless me in this life, I give and bequeath to my well beloved wife, Mary Ann Lloyd, whom I likewise constitute, make, and ordain my sole executrix of my last will and testament, all and singular my lands, messuages, and tenements by her freely to be possessed and enjoyed, together with all my houses and household goods, deeds, and moveable effects; all my children to be educated and settled in business according to my wife's discretion; and

1866

LLOYD v. JACKSON.

I hereby utterly disallow, revoke, and disannul all and every other former testaments, wills, legacies, bequests, and executors by me in any way before named, willed, and bequested, ratifying and confirming this, and no other, to be my last will and testament."

The will was dated 9th June, 1809, and duly attested by three witnesses.

The plaintiff contended that, under this will, Mary Ann Lloyd took an estate for life only.

The learned judge directed a verdict for the plaintiff, with leave to move to enter the verdict for the defendants, on the ground that according to the true construction of the will the devise to Mary Ann Lloyd carried an estate in fee to her.

*Joshua Williams, Q.C.*, obtained a rule accordingly.

June 9. *Mellish, Q.C., H. S. Giffard, Q.C.*, and *J. W. Bowen*, shewed cause. The will was made before the Wills Act (1 Vict. c. 26) was passed, and it contains no words of inheritance. It is clear before the Wills Act that as a general rule a devise without words of inheritance did not pass the fee; but there were some exceptions to the general rule, and the defendants contend that this case comes within the exceptions. It will be urged that the words of the will are to be read as one devise—that it is a devise of all the worldly estate of the testator, and that therefore it passes the fee. Now the words, "as touching such worldly estate wherewith it hath pleased God to bless me," are merely the introductory part of the will. When the whole of the introduction to the will is looked at, it will be seen that these words are part of the preliminary words used by the testator before he begins to dispose of his estate. They are not equivalent to saying, "With reference to my worldly estate, I devise it to A. B." The words "worldly estate," in the introductory part of a will, are not sufficient to turn a life estate into a fee, unless the word estate is imported into the devise. Neither do the words "by her freely to be possessed and enjoyed," coupled with the introductory words, carry a fee to the testator's widow. If the construction of these words was untouched by any previous decisions, then it might be contended that the words "freely to be possessed and enjoyed"

would pass the fee. But it has been held that those words, though coupled with an introductory clause, are not enough: *Goodright* v. *Barron.* (1) There the devise was "as touching such worldly estate wherewith it hath pleased God to bless me in this life, I give, devise, and dispose of the same in the following manner and form"; then followed a devise to the testator's brother of a cottage-house, and all belonging to it in fee; and the will went on, "Also I give and bequeath to my wife Elizabeth, whom I likewise make my sole executrix, all and singular my lands, messuages, and tenements, by her freely to be possessed and enjoyed"; the Court held that the widow did not take the fee, because the latter words were ambiguous, and might mean free from incumbrances; and that the word estate in the introductory clause could not be brought down into the latter clause. Lord Ellenborough, in his judgment, distinguishes that case from *Loveacres* v. *Blight* (2), a case which will be relied on by the other side, by observing that in the last case the words "freely to be possessed and enjoyed by the devisees" could not mean only free of incumbrances, because the testator had before charged the estate with the payment of an annuity to his wife, and therefore they must have been meant to give a fee, or the words would have no meaning at all. It was therefore held in *Loveacres* v. *Blight* (2) that freely to be enjoyed meant free from all limitations. To the same effect is *Bromitt* v. *Moor.* (3) These two cases also establish that where there are no words of limitation in a will, the words relied on to enlarge the life estate into a fee must be clear and unambiguous. *Denn* v. *Gaskin* (4) shews that unless the words in the introductory part of the will are connected with the devise, they do not pass a fee. Lord Mansfield there says: "If the testator had in any way connected the introductory part, 'as to all my worldly estate,' with the devise in question, it might have done. But the introduction is only this: 'As to all such worldly estate as God has endowed me with, I give to A. B. so and so. Suppose he had only given half his property by this will, the introduction would still have been proper; so if he had given the whole of his landed estate only without disposing of the residue of

(1) 11 East, 220.
(2) Cowp. 352.
(3) 9 Hare, at p. 378.
(4) Cowp. 657.

1866

LLOYD v. JACKSON.

his personalty, it would have been equally proper. He does not say in the introduction that he means to dispose of all his worldly estate, but that with respect to it he devises so and so." The whole of Lord Mansfield's reasoning in that case is applicable to the present case. It is true that in this case there is only one devise, but that is immaterial. In *Doe* v. *Allen* (1), there was only one devise, but the Court held on the construction of the words of a will being similar to this, that the devisee only took an estate for life. *Grayson* v. *Atkinson* (2) is distinguishable; there the words of the will were "As to all my temporal estate which it hath pleased God to bless me I give and devise the same as follows;" then followed several legacies, and the will concluded, "As to all the rest of my goods and chattels, real and personal, moveable and immoveable, as houses, gardens, tenements, &c." The Court held that all the rest clearly referred to something mentioned before, and what was mentioned before which he was about to dispose of was all his temporal estate, which passes a fee. In that case the word estate was brought down into the devise, but in *Doe* v. *Ravell* (3), by no possibility of construction could the word estate in the introductory part of the will be referred to in reading the clause devising the property, and the Court held a fee did not pass. The next question is, whether the words "all my children to be educated and settled in business according to my wife's discretion," carry the fee to the testator's widow. Now the rule is clear, that if the testator creates a charge on the devisee in respect of the estate it carries the fee, because it never could have been the intention of the testator to give the devisee a damnosa hæreditas; but if the charge be imposed on the estate, it is not necessary that the devisee should have the fee, because the charge must be executed, whether the estate is in the hands of a devisee or of any one else: *Doe* v. *Allen* (1), *Moor* v. *Denn* (4), *Burton* v. *Powers*. (5) The charge here imposed on the testator's wife is to be carried out in her lifetime, for it is a charge to be exercised in her discretion. Suppose she died within a year after the testator's death, it would not continue a charge. Assume that she took the fee, and devised the estate to one of her children, could the others

(1) 8 T. R. 497. (2) 1 Wilson, 333. (3) 2 C. & J. 617.
(4) 2 B. & P. 247—251. (5) 26 L. J. (Ch.) 330.

say that there was a trust to educate and settle them? Clearly not. These words are only tantamount to the testator saying that his wife is to be the guardian of his children. In *Foley* v. *Parry* (1) the testator gave his real and personal estate to his wife for life, remainder to his great-nephew, and expressed it to be his particular wish and request that his wife, together with his great-nephew's grandfather, should superintend and take care of his great-nephew's education, it was decided that the expenses of the testator's great-nephew's education should be paid out of the income of the testator's estate, because it was held that the request was a gift. In order to enlarge the life estate into a fee, some condition must be imposed on the testator's wife, the execution of which requires an estate larger than a life estate: *Doe* d. *Ashby* v. *Birnes.* (2) Here the charge is to educate and settle the children according to her discretion; the true construction is, that she has a discretionary power to be exercised by her during her life, and it is unnecessary that she should have a larger estate than a life estate. In *Thorp* v. *Owen* (3) the words of the will were "I devise everything to remain in its present position during the lifetime of my wife, for her use and benefit, and after her decease I devise my real estate to my then male heir and his heirs in strict tail male, and I wish my personal estate to be divided among my children. I give the above devise to my wife that she may support herself and children according to her discretion, and for that purpose." Wigram, V.C., decided that the widow took an absolute interest for her life in the real and personal estate. In the judgment he says: "I agree with the argument that if the expression that the gift is to support the children extends to the support of the children throughout the whole of their lives in the various situations that may arise, the impossibility, I may almost say, of measuring the gift to each child by any rule to be laid down in a court of justice—in a case where there is no trust excluding the mother from taking whatever she is not obliged to part with—is a strong argument against holding that the expressions which refer to the children were meant to create a trust binding on her." Now to apply that to the present case, see how vague the bequest is. "All my children to be edu-

(1) 5 Sim. 138. (2) 2 C. M. & R. 23. (3) 2 Hare, 607.

1866

LLOYD v. JACKSON.

cated and settled in business according to my wife's discretion;" in what way are they to be educated, in what business are they to be settled? How is it possible for the Court to say what quantum of her interest the testator's widow is bound to apply to these purposes? These words create no trust, and under this will the widow only takes an estate for life.

June 13. *Joshua Williams, Q.C., H. G. Allen,* and *C. E. Coleridge,* in support of the rule. The question is, whether, according to the established rules of construing wills, an estate for life or an estate in fee passed to the widow of the testator. If the whole of this will be looked at it will be seen that it was the intention of the testator to give his wife an estate in fee, and it is the intention of the testator, as collected from the will, that ought to guide the Court in construing the will: *Nottingham* v. *Jennings* (1); *Biederman* v. *Seymour.* (2) So if lands are limited to an unborn person for life, with remainder to his first and other sons successively in tail, in which case, as such limitations are clearly incapable of taking effect in the manner intended, the Court, in its anxiety to prevent the total disappointment of the testator's intention would give to the parent the estate tail that was designed for the issue: Jarman on Wills, 3rd ed. p. 278. Now, construing this will according to the intention of the testator, it is clear he intended to devise the whole of his worldly estate to his wife, for he meant his will to operate on all his worldly estate. The result of all the cases is this: if a testator begins his will with an introduction "as to all my worldly estate," and then gives certain lands to A. and a house to B., no argument can be drawn from the intention expressed by him to dispose of all his worldly estate, that A. takes an estate in fee simple; because it does not follow that the testator did not intend B. to have all his worldly estate. Though there is clearly an intention that his worldly estate shall be given to some one, when the introductory clause is followed by a devise to A. and another devise to B., then the intention to dispose of the whole estate does not help either A. or B.; but the present is a very different case; here there is one sole devisee and legatee; the testator intends to dispose of all his worldly estate, and he has said to whom he will give it, viz., to his widow. In

(1) 1 P. Wms. 23. (2) 3 Beav. 368.

*Denn* v. *Gaskin* (1) there were several devisees, and Lord Mansfield said if the testator had in any way connected the introductory part of the will with the devise it would have passed the fee; and so in *Goodright* v. *Barron* (2) there were also several devisees. The introductory words, as touching such worldly estate, did not help the devise to the wife, because he had between those introductory words, and the devise to the wife devised a cottage-house, and all belonging to it to his brother, therefore all that appeared by the introductory words was that the testator had the intention to dispose of everything he had, but that intention was not carried out; the introductory part was not united with the demise. Lord Ellenborough, in giving judgment in *Goodright* v. *Barron* (2), says: "With respect to the introductory words it has been held in many cases that they are not sufficient of themselves to carry a fee, but juncta juvant. The word estate, used in the introductory clause, is completely disjoined from the devise in question, and cannot be brought down to join in with the latter clause without doing violence to the words." In the present case the whole runs together as one sentence; and the will is tantamount to the testator saying, "I give all my worldly estate, viz., all my lands and tenements, and goods and chattels to my wife;" and it is clear that a devise of all a man's worldly estate carries the fee: *Night* v. *Sidebotham.* (3) Taking, therefore, the introductory clause, taking the words "by her freely to be possessed and enjoyed," and the charge that is imposed upon her to educate and settle the children, not taking any of these parts separately, but taking the whole will together, the testator intended his wife to have an estate in fee: *Ibbetson* v. *Beckwith* (4); *Loveacres* v. *Blight* (5); *Smith* v. *Coffin* (6); *Doe* d. *Knott* v. *Lawton.* (7) Secondly, the words "all my children to be educated and settled in business according to my wife's discretion" create a trust that passes the fee: *Foley* v. *Parry.* (8) If the testator's widow had sent one of the children to school and paid 10*l.*, and then died, her estate would lose the money. The testator never intended to give his

(1) Cowp. 657.
(2) 11 East, 220, 223.
(3) 2 Doug. 759.
(4) Cases Temp. Talbot, 157.
(5) Cowp. 352.
(6) 2 H. Bl. 444.
(7) 4 Bing. (N.C.) 455.
(8) 2 My. & K. 138.

1866

LLOYD v. JACKSON.

widow a damnosa hæreditas; there is, therefore, a charge on her, and she takes the fee. The mere fact that the devisee has a discretion in the matter is not enough to prevent the trust from being enforced: *Longmore* v. *Elcum.* (1) It is immaterial whether there is an obligation on her or not to carry out the trust, and it is also immaterial whether the estate is great or small. All the children, including the heir, are to be educated and settled in business, and it is clearly a charge on some one—it must be on the wife—it therefore gives her a fee: *Costabadie* v. *Costabadie* (2); *Doe* v. *Richards.* (3)

BLACKBURN, J. The question is, whether the testator's widow took an estate in fee under his will, or only a life estate. We have come to the conclusion that, upon a true construction of the will, the widow did take an estate in fee. The general principle is, that we are to look at the whole will, and endeavour to collect what the intention of the testator was—not in the sense in which a person who was not a lawyer would understand it, but we must see what the intention is, properly expressed. It was very early established before the Wills Act came into operation that a devise of "lands," "farms," "tenements," or equivalent words, though there was very little doubt that the testator meant by these expressions in ninety-nine cases out of a hundred to devise absolutely, would only operate to give an estate for life to the devisee, and would not disinherit the heir, unless there were express words, or unless from the provisions of the will taken altogether it would appear to be the intention that an estate of inheritance should pass. On the other hand, it has been decided in many cases that the word "estate" or an equivalent word contained in the devise, as where the person has said, I devise all my estate in Blackacre to A. B., would carry the inheritance, and would be sufficient to shew the intention that the devisee should have the whole estate, and consequently should have the inheritance. But I do not think that where a testator merely makes a recital in the beginning of his will "touching all my worldly estate," which has the effect of saying, I do not intend to die intestate, those words would operate alone to pass a fee; but they may, by being distinctly con-

(1) 2 Y. & C. (Ch.) p. 363. (2) 6 Hare, 410. (3) 3 T. R. 356.

nected with a subsequent devise, give an estate in fee. The distinction is somewhat fine, but where it is shewn that the word "estate" is brought down into the devise, so that it is clear that the testator did not intend to die intestate, and in disposing of all his estate he uses the same general words, there the estate is included in the devise and carries the inheritance. In the present case, where the testator says, "touching all my worldly estate," it is no more than saying, I intend not to die intestate. The two cases of *Denn* v. *Gaskin* (1) and *Doe* v. *Allen* (2) are decisions in point, and shew that these words are not enough, that the word "estate" not being brought down and incorporated in the devise, you cannot enlarge the devise so as to give the inheritance. Mr. Williams attempted to distinguish those cases on the ground of there being only one devise; that is not accurate. In *Denn* v. *Gaskin* (1), the whole of the lands were devised; in *Doe* v. *Allen* (2), it appeared there was only one devise. I think those two cases are not to be distinguished, and they shew that the introductory words of this will would not operate to convey an estate of inheritance. Then further on in the will the testator gives all his lands, messuages, and tenements, &c., to his wife, "by her freely to be possessed and enjoyed." No doubt in *Loveacres* v. *Blight* (3) Lord Mansfield did give some weight to the words "freely to be possessed and enjoyed;" but in the subsequent case of *Goodright* v. *Barron* (4), where the same words occurred, although *Loveacres* v. *Blight* was brought to their notice, the Court distinctly held that "freely to be possessed and enjoyed" would not give a fee. I think we must follow the latter case, and hold that the words would not enlarge the bequest into a fee. Then we come to that part of the will which I think is sufficient to give an estate of inheritance to the widow. After devising all his lands to his wife to be by her freely possessed and enjoyed, with all his houses, household goods, &c., the testator says, "my children to be educated and settled in business according to my wife's discretion." It has been established by cases in Chancery that where there is an unlimited devise of land, not specifically stating whether for life or inheritance, to a particular devisee, if it happen that the devisee on accepting the estate would incur any burthen,

(1) Cowp. 657. (2) 8 T. R. 497. (3) Cowp. 352. (4) 11 East, 220.

1866

LLOYD v. JACKSON.

that would be an indication of intention by the testator that the devisee shall take an estate in fee; otherwise he might incur a loss. If an estate were devised to a very old person, whose life would be worth but a few years purchase, accompanied by a burthen that would amount to several years purchase, the conclusion that the testator had it in his mind, that the devisee should have the estate for more than his life, would be very strong indeed; but, on the other hand, if the estate were devised to a young person, whose life was worth a great many years purchase, and was then followed by this: "I give to my old nurse a certain small annuity," the reasoning might be very different. If the Courts are to construe the will to give an estate of inheritance according to the magnitude of the estate, or the burthen to be incurred, it will always be uncertain whether the will gives an estate of inheritance or not. Accordingly, influenced by that consideration, it has been established by decided cases that we are not to look at the magnitude of the estate; and in Mr. Jarman's work on Wills, vol. ii. 3rd ed. p. 248, it is said: "It has been long settled that where a devisee whose estate is undefined is directed to pay the testator's debts or legacies, or a specific sum in gross, he takes an estate in fee, on the ground that if he took an estate for life only, he might be damnified by the determination of his interest before reimbursement of his expenditure; and the fact, that actual loss was rendered highly improbable by the disparity in the amount of the sum charged relatively to the value of the land, does not prevent the enlargement of the estate." The question then arises in the present case, do the words relative to the children's education and starting in life amount to a burthen cast upon the widow, if she accepts this devise, and will there be an obligation on her to educate the children and settle them in business according to her discretion? It may very well be that in Chancery there would be a burthen cast on her which she would be compelled to accept, not that her discretion would be controlled: it would be a fiduciary discretion; she could not give away the property; she must bonâ fide apply it in the exercise of her discretion as a charge upon her. If so, according to the decisions there is a burthen cast on her of educating the children, putting them to some business, paying the premiums of apprenticeship, and the like. Looking at the cases

in the Court of Chancery, I should have considerable doubt whether it is obligatory in all cases. The question must turn on certain niceties in order to ascertain whether the clause is obligatory, or merely expressive of the motive and wish of the testator, but not depriving the devisee of the power to do it or not. And if it were necessary to decide that, I should require to look at the cases in Chancery, and should arrive at a decision with considerable diffidence. But I do not think, when we come to look at the reason of the thing, that it is likely to have been the intention of the testator that the devisee should have her estate clogged with a burthen, but if it is to be clogged with a burthen, then it would be more likely that he should have intended to give the fee, otherwise the devisee might be a loser. It seems to me that precisely the same reasoning would apply if, instead of being obligatory, there was a strong expression of a desire only. It appears to me that if the testator gives land to a person and says, I particularly desire that you may not be bound, but it is my request that you should pay such and such sums of money, the inference would be that he intended the land to be given in inheritance, so that the object of his bounty might comply with the moral obligation, which is quite as strong as if it were a legal one. Looking at this case in that view, I think it is unnecessary to decide whether this is a binding trust, which could be enforced in a court of equity, or the strong expression of a wish only, which could not be enforced in a court of equity. In either view, according to the principle of decided cases, it would indicate an intention that the widow should have the inheritance, and it is sufficient to say that in construing the whole will, we think she took an estate of inheritance. That being our opinion, the rule must be absolute to enter the verdict for the defendants.

MELLOR, J. I am of the same opinion. I think, looking at all the expressions contained in the will, we can see a clear intention on the part of the testator that his wife should take an estate in fee. I think Mr. Mellish so far succeeded in his argument as to render it extremely doubtful at all events (notwithstanding the expressions which are to be found in the cases referred to), whether on the decided cases we could safely hold that the expressions as to the testator's worldly estate, unless brought down into the

1866

LLOYD v. JACKSON.

devise, are sufficient to give a fee. I also think that he shewed successfully that the words, "freely to be possessed and enjoyed," are not sufficient to carry a fee. But it is not enough for Mr. Mellish to succeed on one portion of the will: he must go further and shew, that when we come to take the whole will together there is no intention to pass the fee; and though the words in the previous part of the will by themselves might not be sufficient, yet I think Mr. Williams is right in saying they assist us in coming to a conclusion as to the meaning of the last clause which he relies on to shew that the inheritance was intended to pass. I quite agree with my Brother Blackburn that I should have considerable hesitation, if it were necessary to decide that the clause as to the education of the children was an obligation which could be enforced in equity against the widow; at the same time I feel bound to say that the authorities, so far as they bear on the case, appear to me either distinguishable, or to furnish a clue by which, if it were necessary, taking the whole words together in connection and immediately following the devise, "all my children to be educated and settled in business," we might find the testator's intention to be that his children should be educated and settled in business, and that the mode only of doing it should be left to his wife's discretion, and that the wife could not say, I will not educate my children and settle them in business; and I think—if it were necessary to the decision of the case—that an obligation was imposed to do that which the testator manifested his intention she should do. If the wife was to have an absolute discretion whether she should do it or not the words need not have been used; she would have that discretion independently of those words. But I quite agree with my Brother Blackburn that when we come to consider the principle on which those cases have been decided, which proceeded on the ground of a charge being imposed in respect of the estate, we see that the imposition of the charge is used as evidence of the testator's intention. And it appears to me in that respect to be immaterial whether the clause is an absolute obligation, or a mere recommendation to the wife to exercise that discretion, which the husband expects she will reasonably exercise with relation to the children. In either case it is necessary that some amount of estate should be in the wife; because it would be

ridiculous for the testator to say, I hope my wife will do this or that, without leaving her the estate wherewith to do it, and unless the duration of the estate devised to her had some relation to the object contemplated; as a matter of intention it is wholly immaterial whether it is obligatory on the devisee to do that which the testator, ex concessis, intends should be done. If the testator relied upon his wife doing it, clearly his intention was that she should take such an estate as would enable her reasonably to carry out the objects in view. It is satisfactory to have derived such assistance from the very able arguments of counsel, and to have had all the authorities called to our attention; and after considering both I am very decidedly of opinion that our judgment ought to be that the wife took the estate in fee.

SHEE, J. I am of the same The opinion. clear result of the cases which have been cited in the course of the argument is, that words shewing an intention to carry the whole of a testator's estate in quantity and quality, may be held to carry the fee and not merely an estate for life, though no words of inheritance be used. The words of this will import, independently of any legal or equitable construction which has been put on such words in other wills, an intention to give the whole of the testator's estate, real and personal, to his wife, to be by her freely possessed and enjoyed. Yet if the will had contained nothing more, the words "such worldly estate wherewith it hath pleased God to bless me" not being brought down and incorporated in the devise, I should have had some difficulty in coming to the conclusion that the wife took more than a life estate. The intention, however, of the testator is explained by an expression of a wish, or a direction creating a trust. Which of the two it seems to me to matter little, provided we are satisfied that the intention of the testator was, that the wife should enjoy the real estate, devised and bequeathed to her, in a way consistent with the discharge of his and her moral duty to their children, not merely with reference to their nurture in childhood, which would in a vast majority of cases in no way derogate from the full and free enjoyment of the estate by the widow, but subject to an outlay on their account for their education and settlement in business, which, if she had not the fee, would have to be paid out

1866

LLOYD v. JACKSON.

of her income from the estate during her life. Although mindful of his own duty to his children, the testator gives nothing directly to them. There can be little doubt that he meant to give to his wife such an estate as would certainly, unless she forgot her duty, enable her to secure, at the cost to herself of some diminution of pecuniary means, the object of educating and settling her children in life. The words at the end of the devise, "at her discretion," may at first sight be thought to import, and it has been argued that they do import, that she was to have a discretion to dispose of the testator's worldly estate in any way she should think proper. But it seems to me that, coupled with the rest of the will, that is not the right construction to be put upon them, and that the construction suggested by my Brother Mellor is the right one, that is, that the words "at her discretion" are meant to apply to the mode of education and the mode of settlement of her children in business, and not to confer an absolute discretion on the wife to dispose of the worldly estate of the testator as she might think proper, without reference to the interests of the children, and to the duty of the testator and her own duty towards them. For these reasons I am of opinion that this rule should be made absolute.

*Rule absolute.*

Attorney for plaintiff: *J. H. Smith.*

Attorneys for defendant: *Eyre & Lawson.*

DONALD *v.* SUCKLING.

1866
*July* 7.

*Bailment of Pawn or Pledge—Interest under original Pledge not determined by Repledge—Detinue.*

A deposited debentures with B as a security for the payment, at maturity, of a bill endorsed by A and discounted by B, on the agreement that B should have power to sell or otherwise dispose of the debentures if the bill should not be paid when due; *before* the maturity of the bill, B deposited the debentures with C, to be kept by him as a security until the repayment of a loan from C to B *larger* than the amount of the bill. The bill was dishonoured, and while it still remained unpaid, A brought detinue against C for the debentures:—

*Held* (by Cockburn, C.J., Blackburn and Mellor, JJ.; Shee, J., dissenting), that the repledge by B to C did not put an end to the contract of pledge between A and B, and B's interest and right of detainer under it; and that A, therefore, could not maintain detinue without having paid or tendered the amount of the bill.

DECLARATION. That the defendant detained from the plaintiff his securities for money, that is to say, four debentures of the British Slate Company, Limited, for 200*l.* each, and the plaintiff claimed a return of the securities or their value, and 1000*l.* for their detention.

Plea. That before the alleged detention, the plaintiff deposited the debentures with one J. A. Simpson, as security for the due payment at maturity of a bill of exchange, dated 25th August, 1864, payable six months after date, and drawn by the plaintiff, and accepted by T. Sanders, and endorsed by the plaintiff to and discounted by Simpson, and upon the agreement then come to between the plaintiff and Simpson, that Simpson should have full power to sell or otherwise dispose of the debentures if the bill was not paid when it became due. That the bill had not been paid by the plaintiff nor by any other person, but was dishonoured; nor was it paid at the time of the said detention or at the commencement of this suit; and that before the alleged detention and the commencement of this suit, Simpson deposited the debentures with the defendant to be by him kept as a security for and until the repayment by Simpson to the defendant of certain sums of money advanced and lent by the defendant to Simpson upon the security of the debentures, and the defendant had and received the same for the purpose and on the terms aforesaid, which sums of money

1866

DONALD v. SUCKLING.

thence hitherto have been and remain wholly due and unpaid to the defendant; wherefore the defendant detained and still detains the debentures, which is the alleged detention.

Demurrer and joinder.

The case having been argued in Easter Term (April 27), before Blackburn and Shee, JJ., was re-argued in Trinity Term:

May 29. *Harington*, for the plaintiff. There are two questions raised by this demurrer; first, whether a person to whom goods are delivered as a pawn has a right to pawn them to a third person: secondly, if he has, whether the defendant by his plea brings himself within the rule. First, a pawnee has no right to assign over the pawn. There is a distinction between a lien, a mortgage, and a pawn; a lien only gives a personal right to detain; a mortgage passes the absolute property on condition broken; whereas a pawn gives only a right to sell. In *Coggs* v. *Bernard* (1), Holt, C.J., says on vadium or pawn: "As to the property the pawnee has in the pawn or pledge, he has a special property, for the pawn is a securing to the pawnee that he shall be repaid his debt, and to compel the pawnor to pay him." He then adds, that if the pawn will not be the worse for using, as jewels, the pawnee may use them, but although not liable if put safely away, yet he will be answerable if he be robbed while using them; "and the reason is because the pawn is in the nature of a deposit, and as such is not liable to be used. And to this effect is Ow. 123." Holt, C.J., therefore puts a pawn simply as a deposit, to be kept, or at most used, by the pawnee himself. In *Ryall* v. *Rolle* (2) Burnet, J., says: "There is scarce any book that treats upon pawns, but considers them as in the possession of the pawnee;" and the other judges present agreed to this doctrine. There again stress is laid on the possession of the pawnee himself. That case was assented to in *Reeves* v. *Capper* (3), and the parting with possession by the bailee shewn to be consistent with the terms of the particular bailment. In Bell's Commentaries (4) it is said: "By pledge, a moveable subject, or the title-deeds, vouchers or muniments of a debt or jus incorporale are delivered to the creditor, in

(1) 2 Ld. Raym. at pp. 916—917.
(2) 1 Atk. at p. 167.
(3) 5 Bing. N. C. at p. 140.
(4) B. ii. c. vi. s. 2; vol. i. p. 564, 6th ed.

security of debt, to remain with him, and be detained in possession till the debtor shall redeem them; and if necessary, to be sold by judicial authority for satisfaction of the debt; the creditor engaging to restore the thing pledged when the debt shall be paid." So in Pothier, Contrat de Nantissement (1), it is said: "Le créancier, à qui la chose a été donnée en nantissement, n'a que le droit de la détenir." Again in Story on Bailments, s. 287, it is said: "In the case of a pledge of personal property, the right of the pledgee is not consummated except by possession; and ordinarily, when that possession is relinquished, the right of the pledgee is extinguished or waived." And the learned author treats the pawnee's relation to the pawnor as strictly of a fiduciary character, for in s. 319, after stating that neither in the Roman nor common law is a pawnee allowed to purchase at the sale of a pawn, he adds: "Indeed the rule is founded upon a principle still more broadly enforced in equity jurisprudence, that where a fiduciary relation exists between parties, the agent shall never be permitted to obtain personal benefit to himself, by any act done or purchase made, which may prejudice the right or interests of his principal." So, in s. 299, he says: "If the pledgee voluntarily, by his own act, places the pledge beyond his own power to restore it, as by agreeing that it may be attached at the suit of a third person, that will amount to a waiver of his pledge."

[SHEE, J. Domat (2) says: "The rule with us is, that the mortgage or pawn upon a moveable thing lasts no longer than whilst the thing is in the custody of the person who is bound, or he who has it for his security is in possession of it. But if the debtor makes it to pass into other hands, either by alienating it, or pawning it, the creditor cannot any longer lay claim to it. And this rule is expressed in these words: that moveables have no sequel by a mortgage."]

It is true that in s. 327, Story says: "Whatever doubt may be indulged as to the case of a mere factor, it has been decided that in the case of a strict pledge, if the pledgee transfers the same to his own creditor, the latter may hold the pledge until the debt of

(1) Ch. ii. s. 23; tom. viii. p. 613, ed. par Dupin.

(2) Civil Law, b. iii. tit. 1, Pawns and Mortgages, s. 1; vol. i. p. 346, transl. by Strahan.

1866

DONALD v. SUCKLING.

the original owner is discharged." But the authority cited for that proposition is an American, not an English case, *Jarvis* v. *Rogers* (1), and it does not bear out the doctrine, for that was a case of the pledge of negotiable securities; and when the case was first before the Court (2), Parker, C.J., said: "This case is distinguishable from the common cases of agents, factors, and commission merchants, to whom property has been entrusted for special purposes, and who have no right to exceed that authority. We do not question any of those cases, nor those which have decided that he to whom property has been pledged cannot transfer a title in such property to another. We proceed upon the ground that the plaintiff's intestate had by his own act, together with the other members of the company, given a negotiable quality to these certificates." When *Jarvis* v. *Rogers* (3) was the second time before the Court, no doubt Jackson, J., after citing *Ratcliff* v. *Davis* (4), *Mores* v. *Conham* (5), and *Demainbray* v. *Metcalfe* (6) says: "From these cases it appears that the pawnee may deliver the goods to a stranger without consideration; or he may sell and assign all his interest absolutely; or he may assign it conditionally, by way of pawn; without in either case destroying the original lien, or giving to the owner a right to reclaim them on any other or better terms than he could have done before such delivery or assignment." But this is merely obiter, and was not necessary for the decision of the case, and is not borne out by the cases cited. *Ratcliff* v. *Davis* (4) simply decides that, on a pledge by A to B, to secure payment of a sum of money, no day being named for payment or redemption, if B places it with C and then dies, on tender of the money to B's executor and demand of and refusal by C, A can maintain trover against C. *Mores* v. *Conham* (5) was an assumpsit, that L had pledged goods with the plaintiff as a security for a debt, and that the defendant had promised the plaintiff to pay the debt if he would deliver the pawn, the question being, whether the promise to deliver the pawn was a good consideration to support an assumpsit. Foster, J., differing from the majority of the Court,

(1) 15 Mass. Rep. 389.
(2) 13 Mass. Rep. at p. 107.
(3) 15 Mass. Rep. at p. 408.
(4) Yelv. 178; 1 Bulst. 29; Cro. Jac. 244.
(5) Owen, 123.
(6) 2 Vern. 691; 698.

held that the pawnee "had not such an interest in the pawn as that he might deliver it over to another, or make a legal contract for it." The majority, no doubt, held that he had such an interest as he might assign over; but even their decision goes no further than the power to assign for the amount of the original debt; for they say, "and the assignee shall be subject to a detinue if he detains it upon payment of the money by the owner." And it is observable that Holt, C.J., who cites the case in *Coggs* v. *Bernard* (1), only cites it for the doctrine that the pawnee may use the pawn if it be not injured by use. In *Demainbray* v. *Metcalfe* (2) the time for payment of the original debt by the pawnor had elapsed, and on his seeking to get the pawn back from an insolvent sub-pawnee, the Court refused to assist him unless he paid the whole amount due to the defendant from his pawnor; it is therefore no authority at law, but simply proceeds on the principle that he who seeks equity must do equity. If the pawnee may repledge the pawn, the sub-pledgee may do the same, and so on ad infinitum; to whom, then, is the original pawnor to apply? The relation between the pawnor and pawnee is of a fiduciary and personal character, and until the time for redeeming the pledge has elapsed the pawnee is bound to keep the pawn. To hold otherwise would be in effect to make a chose in action assignable. Secondly, assuming the pawnee may repledge, still the facts disclosed in the plea do not justify the defendant. As against the defendant it must be taken, first, that Simpson's debt to the defendant, to secure which the debentures were pawned, was *larger* than the original debt of the plaintiff to Simpson, and also that Simpson pledged the debentures *before* the bill became due. By pledging for a larger sum the pawnee puts it out of his power to restore the article to the original bailor, and by that waives his pledge, as is said in Story on Bailments, s. 299, already cited. (3) By pledging during the currency of the bill, Simpson was guilty of a conversion: *Johnson* v. *Stear* (4); and he therefore passed no title to the defendant. In *Johnson* v. *Stear* (4) the majority of the Court differed from Williams, J., as to the measure of

(1) 2 Ld. Raym. at p. 917.

(2) 2 Vern. 691, 698; Gilb. Eq. C. 104; 1 Eq. C. Ab. 324; Prec. Ch. 419.

(3) Ante, p. 587.

(4) 15 C. B. (N.S.) 330; 33 L. J. (C.P.) 130.

1866

DONALD v. SUCKLING.

damages; but the decision of the whole Court is a direct authority that a sale of a pawn before the time for redemption has arrived is a conversion; and the judgment of Williams, J., certainly enunciates a more logical conclusion as to the measure of damages.

*Gray, Q.C.* (*Gadsden* with him), for the defendant. By the contract of pledge the pledgee acquired sufficient property in the pawn to do what the plea alleges he has done. If A pledges a chattel to B to secure 50*l.*, it is clearly part of the contract that A is to pay B before he can be entitled to have the article back; but it is said, because B has pledged it to a third person, A is entitled to have it back at once without paying. The judgment of Holt, C.J., in the very first case cited, *Coggs* v. *Bernard* (1), is contrary to this proposition with reference to the bailment of vadium or pawn. A pawn or pledge is very different from a mere lien. In *M'Combie* v. *Davies* (2), Lord Ellenborough says, that a lien is personal, and cannot be transferred to third persons; but he afterwards adds, that "his observations were applied to a tortious transfer of the goods of the principal by the broker undertaking to pledge them as his own; and not to the case of one who, intending to give a security to another to the extent of his lien, delivers over the actual possession of goods on which he has a lien, to that other with notice of his lien, and appoints that other as his servant to keep possession of the goods for him; in which case he might preserve his lien." *Paterson* v. *Tash* (3), and *Daubigny* v. *Duval* (4), recognise the distinction between a lien and a pledge. So in Bac. Ab. tit. Bailment (A.) (B.), it is said that a simple bailment gives no interest in the pawn; but "pledging is where goods are delivered in security for money lent, and by such pledging the pawnee hath more than the naked possession in the nature of a bailment, for he hath the property or interest in the thing itself:" citing 2 Salk. 522. The same doctrine is enunciated in 4 Vin. Ab. tit. Bailment (B.). In *Ratcliff* v *Davis* (5), the pawnor had tendered the amount secured, so that it is no authority against the present defendant; on the contrary,

(1) 2 Ld. Raym. at pp. 916—917.
(2) 7 East, at pp. 6, 7.
(3) 2 Str. 1178.
(4) 5 T. R. 604.
(5) Yelv. 178; Cro. Jac. 244.

it shews that the pawnee has a special property in the pawn until revested in the pawnor by payment or tender of the debt. In *Demainbray* v. *Metcalfe* (1), the Court dealt with a pledge precisely as if it had been the case of a mortgage.

[SHEE, J. The reporter, Vernon, queries that case.]

It was followed and approved in *Ex parte Deeze.* (2) In Whitaker on Lien, p. 140, it is said: "The pawnee has such an interest in the pawn that he may assign it over to a third person, and the assignee will be subject to an action of detinue if he detains it after payment or tender of the money by the owner." And in Montagu on Lien, p. 22: "A pawnee may assign the pawn to the extent of his interest." All that the pawnee is bound to do is to be ready to re-deliver the pawn on payment of the debt. *Lee* v. *Atkinson* (3) shews that the use of the pledge contrary to the bailment does not determine the bailment or divest the special property of the pawnee. In Bac. Ab. tit. Bailment (C.) an apparently contrary doctrine is laid down: "If a man lend another his sheep to stock his land, the borrower hath the bare use of them; but if he kill them the owner shall have a general action of trespass, or an action of trover at his election; for though the use is in the borrower, yet the property is in the lender, and the killing of the sheep is an open violation of another's property, which is complained of in the general action of trespass." For this Co. Litt. 57a is cited. Littleton says (4): "If I lend (baille) to one my sheep to tathe (composter) his land, or my oxen to plough the land, and he killeth my cattle, I may well have an action of trespass against him, notwithstanding the lending" (baillement). On which Coke's comment is (5): "And the reason is that when the bailee having but a bare use of them taketh upon him as an owner to kill them, he loseth the benefit of the use of them. Or in these cases he may have an action of trespass sur [le case for this conversion, at his election." And these passages may have been the foundation for the doctrine that any parting with the pawn puts an end to the contract of pledge. But this doctrine cannot be maintained. In order to put an end to the contract, there must be such a dealing with the pawn as to be

(1) 2 Vern. 691; 698. (2) 1 Atk. 228. (3) Yelv. 172; Cro. Jac. 236.
(4) Tenures, s. 71. (5) Co. Litt. 57 a.

1866

DONALD v. SUCKLING.

absolutely inconsistent with the continuance of the contract. The plaintiff here not having paid or tendered the amount of the bill, is in the same position as a vendee who has not paid for the goods sold, and he or his assignees cannot maintain *trover* against the unpaid vendor who has retained possession, although he has resold them: *Bloxam* v. *Sanders*. (1) In that case, notwithstanding the dealing with the property by the unpaid vendee, the contract remains, and the remedy is an action on the case for such damages as the vendee has sustained, in calculating which the price he was to pay must be deducted. And this principle was applied by the majority of the Court, in *Johnson* v. *Stear* (2), to the case of a pawnee who had sold the pledge before the day for payment of the debt had arrived; and they held that, although the pledgee had sold, and so been guilty of a wrongful act, the nature of the contract of pledge was such that it was not put an end to by this wrongful dealing with the article pledged. Story's authority is directly in favour of the defendant. He says (3): "The pawnee may, by the common law, deliver over the pawn into the hands of a stranger for safe custody without consideration: or he may sell or assign all his interest in the pawn; or he may convey the same conditionally by way of pawn to another person; without in either case destroying or invalidating his security. But if the pawnee should undertake to pledge the property (not being negotiable securities) for a debt beyond his own, or to make a transfer thereof to his own creditor as if he were the absolute owner, it is clear that in such a case he would be guilty of a breach of trust; and his creditor would acquire no title beyond that held by the pawnee. The only question which, under such circumstances, would seem to admit of controversy, is, whether the creditor should be entitled to retain the pledge until the original debt was discharged, or whether the owner might recover the pledge in the same manner as if the case was a naked tort, without any qualified right in the first pawnee." And after commenting on the peculiar law as to a factor's right being only a lien, and not strictly a pledge, Story proceeds (s. 327): "But whatever doubt may be indulged as to the

(1) 4 B. & C. 941.
(2) 15 C. B. (N.S.) 330; 33 L. J. (C.P.) 130.
(3) On Bailments, s. 324.

case of a factor, it has been decided, that in the case of a strict pledge, if the pledgee transfers the same to his own creditor, the latter may hold the pledge until the debt of the original owner is discharged;" citing *Jarvis* v. *Rogers*. (1) Lastly, on the pleadings the defendant is entitled to judgment. The declaration is in detinue, which assumes an immediate right to possession in the plaintiff; but the plea, taken most against the defendant, shews that the original debt is still unpaid, and so negatives the plaintiff's right to possession. As to the argument of hardship on the plaintiff, he need not go to the sub-pledgee, but on tender to the original pledgee of the amount of his debt he would have been entitled to have the debentures restored to him.

*Harington* in reply. The only authority for Story's doctrine of the right of the pledgee to repledge, is *Jarvis* v. *Rogers* (1); but that, as already pointed out, was a pledge of negotiable securities, and an innocent transferee for value had a right to hold them against all the world. *De Bouchout* v. *Goldsmid* (2) shews that under a general power to sell, assign, and transfer, an agent cannot pledge for his own debt. In *Hartop* v. *Hoare* (3), Lee, C. J., delivering the judgment of the Court, points out that a pawn differs from a sale: for a pawn tends to stop the change of property in the thing pledged.

*Cur. adv. vult.*

July 7. The following judgments were delivered:

SHEE, J. [After stating the pleadings.] This plea sets up a right to detain the debentures, founded on a bailment of pawn by the plaintiff to Simpson, under which Simpson, if the bill should not be paid, had a right to sell the debentures, paying the overplus above the amount of the bill and charges to the plaintiff,—that is, to sell on the plaintiff's account and for his and Simpson's benefit,—and a repawn of them by Simpson as a security for a loan to him by the defendant.

It must be taken against the defendant, that the debentures were pledged to him by Simpson before the plaintiff had made default; it must be taken, too, that the advance for which the

(1) 15 Mass. Rep. 389. (2) 5 Ves. 211. (3) 3 Atk. at p. 52.

1866

DONALD v. SUCKLING.

debentures were pledged to the defendant by Simpson was of a greater amount than the debt for which Simpson held them; it is consistent with the facts pleaded, either that it was repayable before or repayable after the maturity of the plaintiff's bill, and that the debentures were pledged by Simpson along with other securities, from which they could not at Simpson's pleasure, or on tender by the plaintiff of the sum for which they had been pledged to Simpson, be detached; and therefore that Simpson had put it out of his power to apply them by sale or otherwise to the only purpose for which possession of them had been given to him, viz. to secure the payment of his debt and the release of the plaintiff, by the sale of them, from liability on the bill which Simpson had discounted for him.

Whether this pledge to the defendant by Simpson was such a conversion by him of the debentures as destroyed his right of possession in them, and revested the plaintiff's right to the possession of them freed from the original bailment, is the question for our decision.

The contention that a pawnee is entitled to exercise over the chattel pawned to him a power so extensive as the one which this plea sets up, was before the case of *Johnson* v. *Stear* (1), if it be not now, wholly unsupported by authority.

A pawn is defined by Sir William Jones (2) to be "a bailment of goods by a debtor to his creditor, to be kept by him till his debt is discharged;" and by Lord Holt (3) to be "a delivery to another of goods or chattels to be security to him for money borrowed of him by the bailor;" and by Lord Stair (4) "a kind of mandate whereby the debtor for his creditor's security gives him the pawn or thing impignorated, to detain or keep it for his own security, or in the case of not-payment of the debt, to sell the pledge and pay himself out of the price, and restore the rest, or restore the pledge itself on payment of the debt; all which is of the nature of a mandate, and it hath not only a custody in it, but the power to dispone in the case of not-payment;" and by Bell (5)

(1) 15 C. B. (N.S.) 330; 33 L. J. (C.P.) 130.

(2) On Bailments, pp. 118, 36.

(3) *Coggs* v. *Bernard*, 2 Ld. Raym. at p. 913.

(4) Institutions of the Law of Scotland, b. i. tit. 13, s. 11.

(5) Principles of the Law of Scotland, ss. 1362, 1363; 4th ed. p. 512.

"a real right or jus in re, inferior to property, which vests in the holder a power over the subject, to retain it in security of the debt for which it is pledged, and qualifies so far and retains the right of property in the pledger or owner."

In the Roman civil law, as in our own law (see *Pigot* v. *Cubley*) (1), the bailment of pawn implied what in this bailment is expressed, a mandate of sale on default of payment. Without it, or without, as in the Scotch and French law, a right to have a pledge sold judicially for payment on default made, the security by way of pledge would be of little value. The pawnee is said by Lord Coke, in his Commentaries on Littleton (2), to have a "property;" and in *Southcote's* case (3) to have a "property in and not a custody only," of the chattel pawned; by which Lord Holt (4) understands Lord Coke to mean a "special property," consisting in this, "that the pawn is a security to the pawnee that he shall be repaid his debt, and to compel the pawnor to pay him;" or in the words of Fleming, C.J., in *Ratcliff* v. *Davis* (5), "a special property in the goods to detain them for his (the pawnee's) security," that is, not a property properly so called, but the jus in re, that is, in re alienâ, of the Roman lawyers; the opposite, as Mr. Austin says (6), to property; but a right of possession against the true owner, and under a contract with him until his debt is paid, and a power of sale for the reciprocal benefit of the pawnee and pawnor on default of payment at the time agreed upon.

Mr. Justice Story says (7), that "the pawnee may by the common law deliver the pawn into the hands of a stranger without consideration, for safe custody, or convey the same interest conditionally by way of pawn to another person, without destroying or invalidating his security, but that he cannot pledge it for a debt greater than his own; that if he do so he will be guilty of a breach of trust, by which his creditor will acquire no title beyond that of the pawnee; and that the only question which admits of controversy is, whether the creditor shall be entitled to retain the pledge until

(1) 15 C. B. (N.S.) 701; 33 L. J. (C.P.) 134.
(2) Co. Litt. 89 a.
(3) 4 Rep. 83 b.
(4) 2 Ld. Raym. at pp. 916, 917.
(5) Cro. Jac. at p. 245.
(6) Lectures on Jurisprudence: Tables and Notes, vol. iii. p. 192.
(7) On Bailments, s. 324.

1866

DONALD v. SUCKLING.

the original debt (that is, the debt due to the first pawnee) is discharged, or whether the owner may recover the pledge in the same manner as if the case was a naked tort without any qualified right in the first pawnee." So much of this passage as is stated to be clear law, viz. that the pawnee may deliver the chattel pawned to a stranger for safe custody without consideration, or convey the same conditionally (*i.e.*, it may be presumed, on the same conditions as those on which he holds it), by way of pawn to another person for a debt not greater than his own, without destroying or invalidating his security, has no application to the case before us: inasmuch as the pawn by Simpson to the defendant was not for safe custody, nor without consideration, nor conditionally, nor for a debt not greater than the debt due by the plaintiff to Simpson, and because the power given to the pawnee by this bailment to dispose of the debentures by sale *or otherwise*, should his debt not be paid, might probably be considered, at least after default made, to enlarge the ordinary right of a pawnee over the chattel pawned. There is nothing in the passage which affords any countenance, except by way of query, to the position, that a pawnee, who, as in this case, has placed the chattel pawned out of the pawnor's power, and out of his own power to redeem it by payment of the amount for which it was given to him as a security, and who has deprived himself of the power of selling it for the payment of the pawnor's debt, can by so doing shield the creditor to whom he repawns it from an action of detinue at the suit of the real owner. Mr. Justice Story indeed says (1), "that if the pledgee voluntarily and by his own act places the pledge beyond his power to restore it, as by agreeing that it may be attached at the suit of a third person, that will amount to a waiver of the pledge." It would be difficult to reconcile any other rule in respect of the pledging by pledgees of the chattels pawned to them with the well-established doctrine of our courts and the courts of the United States of America in respect of the pledging by factors of the goods entrusted to them. Factors, like pledgees, have a mandate of sale,—sale irrespectively of default of any kind is the object of the bailment to them; they have a special property and right of possession against all the world except their principal, and against him if

(1) On Bailments, s. 299.

they have made advances on the security of his goods entrusted to them; to give effect to that security they may avail themselves of their mandate of sale; but if they place the goods out of their own power by pledging them, although it be for a debt not exceeding their advances, the pawnee from them (except under the Factors Acts) is defenceless, in trover or detinue, even to the extent of his loan, against the true owner.

Why it should be otherwise between the true owner and the pawnee from a pawnee of the true owner's goods no reason was adduced during the argument before us, nor indeed was it possible to adduce any reason, seeing that in all the decisions on pledges by factors the relation between a factor who has made advances on the goods entrusted to him and his principal has been held not distinguishable or barely distinguishable in its legal incidents from the relation between pawnee and pawnor; a factor being, as Mr. Justice Story says, "generally treated in juridical discussions as in the condition of a pledgee." (1)

The case of *Johnson* v. *Stear* (2), is a clear authority for holding, that Simpson, in dealing with the debentures in the way which he must be taken on this plea to have done, was, as the defendant also was, guilty of a conversion of them; and unless that case is also an authority binding upon us for the doctrine, that the conversion by a pawnee of the thing pawned is not such an abuse of the bailment of pawn as annuls it, but that there remains in him, and in an assignee from him, and in an assignee from his assignee, and so on toties quoties, without limit as to the number of assignments or the consideration for them, an interest of property in the pawn which defeats the owner's right of possession, the plaintiff is entitled to our judgment.

As I read the case of *Johnson* v. *Stear* (2), and the case of *Chinery* v. *Viall* (3), and *Brierly* v. *Kendall* (4), on the authority of which it proceeded, the judgments of the majority of the learned judges of the Court of Common Pleas, in the first of them, and the judgments of the Court of Exchequer, and of the Court of

(1) On Bailments, ss. 325, 327; citing *Daubigny* v. *Duval*, 5 T. R. 604; *M'Combie* v. *Davies*, 7 East, 5.

(2) 15 C. B. (N.S.) 330; 33 L. J. (C.P.) 130.

(3) 5 H. & N. 288; 29 L.J. (Ex.) 180.

(4) 17 Q. B. 937; 21 L. J. (Q.B.) 161.

1866

DONALD v. SUCKLING.

Queen's Bench, in the second and the third, are based on the principle that, in an action to recover damages for a conversion it is not an inflexible rule of law that the value of the goods converted is to be taken as the measure of damages; that when a suitor's real cause of action is a breach of contract he cannot by suing in tort entitle himself to a larger compensation than he could have recovered in an action in form ex contractu; and therefore that when a verdict is obtained against an unpaid vendor for the conversion of the thing sold by him, or against an unpaid pawnee for the conversion of the thing pledged to him, he is entitled to be credited, in the estimate by the jury of the damages to be paid by him, for the value of such interest or advantage as would have resulted to him from the contract of sale or the contract of pawn if it had been fulfilled by the vendee or pawnor.

That this was the ratio decidendi in these cases seems to me clear from the facts of *Chinery* v. *Viall* (1), and *Brierly* v. *Kendall* (2), which raised no question between the litigant parties in any respect analogous to the question which we in this case have to decide. In *Chinery* v. *Viall* (1), the plaintiff who was the vendee of forty-eight sheep, for five only of which he had paid, under a bargain which entitled him to delivery of the whole lot before payment, brought his action against the vendor for a conversion by parting with the sheep to another purchaser. If the defendant's interest in the unpaid balance of the agreed price of the sheep had not been credited to him in the amount of damages, the plaintiff who had only paid for five of them would have pocketed the full value of the forty-three which had been converted.

In *Brierly* v. *Kendall* (2), an action of trespass, there was a loan of the defendant to the plaintiff secured by bill of sale of the plaintiff's goods, in which was a reservation to the plaintiff of a right to the possession of the goods until he should make default in some payment. Before any default the defendant took the goods from the plaintiff and sold them. For this wrong he was liable in trespass; but the measure of damages was held to be, not the value of the goods, but the loss which the plaintiff had really sustained by being deprived of the possession. The wrongful act

(1) 5 H. & N. 288; 29 L. J. (Ex.) 180.
(2) 17 Q. B. 937; 21 L. J. (Q.B.) 161.

of the defendant did not annihilate his interest in the goods under the bill of sale; and such interest was considered in measuring the extent of the plaintiff's right to damages.

These cases are manifestly not in conflict with, if indeed they at all touch, the principle relied upon against the plea which is here demurred to, that, if the pawnee converts the chattels pawned to him, the bailment is determined and the right of possession revested in the true owner of them.

In *Johnson* v. *Stear* (1), the defendant, a pawnee of dock warrants, had anticipated by a few hours only the time at which under his contract with the owner of them he might have sold and delivered them; he had applied before the time of action brought the proceeds of their sale to the discharge of the plaintiff's debt to him, or he held them specially applicable to that purpose, and the plaintiff, had he sued the defendant in contract for not keeping the pledge until default made, could not have proved that he had sustained any damage. The Chief Justice, speaking for himself and two of his learned brothers, did indeed say, that "the deposit of the goods in question with the defendant, to secure repayment of a loan to him on a given day, with a power to sell in case of default on that day, created an interest and a right of property in the goods which was more than a mere lien; and the wrongful act of the pawnee did not annihilate the contract between the parties nor the interest of the pawnee in the goods under that contract"(2); but he cannot be understood to have meant by the words "interest and right of property in the goods," and by the words "more than a mere lien" other than "a special property," as defined by the authorities before referred to by me, viz. a real right or jus in re, a right of possession until default made, a right of retention or sale after default made; nor, as I think, to have intended more, by the words "the wrongful act of the pawnee did not annihilate the contract between the parties," than that the contract, in the breach of which consisted the tort of which the plaintiff complained, must still be considered to subsist, at least for the purpose of being referred to for the measure of the damage sustained by the pawnor and the damages to be recovered by him.

(1) 15 C. B. (N.S.) 330; 33 L. J. (C.P.) 130.

(2) 15 C. B. (N. S.) 334—335; 33 L. J. (C.P.) 131.

1866

DONALD v. SUCKLING.

The case before us differs, as I think, in essential particulars, as respects the principle upon which damages would have been measurable, had the action been in trover, from the case in the Common Pleas. The defendant, as assignee of the pawnee, could not surely have set up in mitigation of damages an interest derived by him from the pawnee before default made by the pawnor; the pawnee, by the express terms of the bailment to him, not having the right to dispose of the debentures by sale or otherwise until after default made. Besides, it is impossible to shut one's eyes to the broad distinction between the case of the sale a few hours too soon of a pawn, which, as in the case of *Johnson* v. *Stear* (1), the pawnor "had no intention to redeem,"—the proceeds of the sale being devoted before action brought to discharge of the debt for which the pawn had been given as a security,—and the abuse of a pawn by the pawnee in wrongfully, for his own purposes, placing out of his power, and out of the pawnor's power, to redeem the pawn, should he have the means to do so.

By the contract of bailment between the plaintiff and Simpson the proceeds of the sale of the debentures, which are the subject of this suit, had been specifically appropriated to the payment of the plaintiff's bill in the event of his not being able to meet it with other means. Simpson held the debentures in trust, should the bill not be paid, to sell them on the plaintiff's account, or allow the plaintiff to sell them or raise money on them to pay his bill. Instead of that, Simpson, before default made by the plaintiff, converted them to his own use, obtaining their agreed value in pledge from the defendant, and imposing upon the plaintiff the burthen of making other provision to meet his bill. By this act of Simpson the plaintiff, in my judgment, did in fact sustain damage, and at the maturity of the bill, if not before, to the full amount of the current saleable value of the debentures. I am at a loss to see how the conduct of Simpson, in thus dealing with the debentures, and how the title of the defendant, claiming under him, are to escape the operation of the rule, that if the pawnee, except conditionally (an exception for which the authority is but slender), parts with the possession of the pawn, he loses the benefit

(1) 15 C. B. (N.S.) 330; 33 L. J. (C.P.) 130.

of his security: *Ryall* v. *Rolle* (1); *Reeves* v. *Capper* (2); *Johnson* v. *Stear* (3), per Williams, J.; or the operation of the maxim, nemo plus juris ad alium transferre potest quam ipse habet.

For these reasons, as it seems to me, the case of *Johnson* v. *Stear* (3) ought not to govern our decision. It could not be followed by us as an authority in favour of the defendant without inattention to its true principle, viz. that between the parties to a contract, the measure of damages for a breach of the contract must be the same, whether the form of action be ex contractu or ex delicto, and that in such a case, general rules applicable to the latter form, the only one competent for the redress of injuries purely tortious, are not to be strained to the doing of manifest injustice. It is open also, in a right estimate of it as an authority for the case in hand, to this observation:—The interest of a plaintiff in the damages recoverable by him for a tort, which is in its true nature a breach of contract, is restricted by the implied stipulations of the contracting parties to the amount which, in the conscience of a jury, may suffice to give him an adequate compensation. The action of detinue for a chattel, of which the bailment has been abused, against a person not party to the contract of bailment, is not based upon a breach of contract, and not within the rules applicable to actions of tort which are based on breaches of contract. In detinue the plaintiff sues, not for the value tantamount of the thing detained from him, but for the return of the thing itself, which may to him have a value other and higher than its actual value; and only for its value if the thing cannot be delivered to him (4), and for damages for its detention and his costs of suit. A judgment to recover the value only has been reversed for error: *Peters* v. *Heyward* (5); the integral undiminished thing itself, unaffected by countervailing lien or abatement of whatever kind, being the primary object of the suit. In an action of trover for the conversion by the pawnee of the subject of the bailment, the plaintiff, according to the judgment of the majority of the Court in *Johnson* v. *Stear* (3), is entitled only to recover the amount, in money, of the damage which he proves himself

(1) 1 Atk. 165.
(2) 5 Bing. N. C. 136.
(3) 15 C. B. (N.S.) 330; 33 L. J. (C.P.) 130.
(4) Tidd's Forms, 8th ed. 339.
(5) Cro. Jac. 682.

1866

DONALD v. SUCKLING.

to have sustained; in an action of detinue for the recovery from the assignee of the pawnee of the chattel pawned, and of which the pawn has been abused and forfeited, the plaintiff is entitled to recover the chattel itself, because it was a term of the contract of pawn, that if the pawn should be abused by the pawnee his right to the possession of it should cease; and the defendant can have derived no right of possession from one whose own right of possession was determined by his attempt to transfer it.

Unless, therefore, we were prepared to hold, in disregard of the clearly expressed opinion of Story and Mr. Justice Williams, that detinue can in no case lie for an unredeemed pawn, however much the bailment of it may have been abused, we are not at liberty to apply the ratio decidendi in *Johnson* v. *Stear* (1) to the case before us.

It raises a strong presumption against the defence set up in this plea, that nothing bearing the slightest resemblance to the right of possession, which it claims for the assignee of a pawnee, is to be found in the copious title of the Digest (2), "De pignoribus et hypothecis; et qualiter ea contrahantur, et de pactis eorum," or in the five following titles of the contract of pawn and hypothec and its incidents, or in the title "De pigneratitiâ actione, vel contrâ" (3), or in the works of any English, French, or Scotch jurist.

The dictum of the majority of the Court in the case of *Mores* v. *Conham* (4), that the pawnee has such an interest in the pawn as he may assign over, was not the point decided in that case; nor, as it seems to me, a point essential to its decision; the point decided being, that the surrender by the plaintiff of a chattel pawned to him by a third person was a good consideration for a promise by the defendant to pay the debt for which it had been given as security. It does not seem to follow from that decision that the surrenderee thereby acquired such an interest in the pawn as would enable him to defend an action of detinue at the suit of the true owner, the reunion of whose rights of property and possession was, unless they meant to rob him, the real object of the transaction. The

(1) 15 C. B. (N.S.) 330; 33 L. J. (C.P.) 130.
(2) Dig. lib. xx. tit. 1.
(3) Dig. lib. xiii. tit. 7.
(4) Owen, 123, 124.

inference, drawn from this very obscure and superficially reasoned case in favour of the defendant's plea, is wholly irreconcilable with the doctrine of Domat, the highest authority on all questions depending, as this question does, upon the rules and principles of the Roman civil law, that the bailments of "hypothèque" and "gage" last only as long as the thing hypothecated is in the hands of the person charging it, or the thing pawned in the hands of him who takes it for his security (1), and with the doctrine of Erskine, a jurist of nearly equal eminence, that "in a pledge of moveables the creditor who quits the possession of the subject loses the *real right* he had upon it." (2)

I think that the bailment to Simpson was determined by the pledge by him to the defendant under the circumstances stated in the plea; that both of them have been guilty of a conversion; that the plaintiff might, as Mr. Justice Williams said in the case of *Johnson* v. *Stear* (3), lawfully, should the opportunity offer, resume the possession of the debentures, and hold them freed from the bailment; and may, the defendant being remitted to his remedy against Simpson, and Simpson to his remedy upon the bill, recover them, or their full value, if they cannot be delivered to him, in this action of detinue.

MELLOR, J. [After stating the declaration and plea.] To this plea the plaintiff demurred, and upon demurrer, I think that we must assume that the pledging of the debentures by Simpson to the defendant took place before default was made by the plaintiff in payment of the bill of exchange at maturity, and that we must also assume that the money for which the debentures were pledged by Simpson, as a security to the defendant, was of larger amount than the amount of the bill of exchange discounted for the plaintiff by Simpson. The question thus raised by this plea is, whether a pawnee of debentures, deposited with him as a security for the due payment of money at a certain time, does, by repledging such debentures and depositing them with a third person as a security for a larger amount, before any default in payment by the pawnor,

(1) Domat, Lois Civiles, liv. iii. tit. 1, s. 1.

(2) Institute of the Laws of Scotland, b. iii. tit. 1, s. 33.

(3) 15 C. B. (N.S.) at p. 341; 33 L. J. (C.P.) at p. 134.

1866

DONALD v. SUCKLING.

make void the contract upon which they were deposited with the pawnee, so as to vest in the pawnor an immediate right to the possession thereof, notwithstanding that the debt due by him to the original pawnee remains unpaid. If the affirmative of this proposition be maintained, the result seems primâ facie to be disproportionate to any injury which the pawnor would be likely to sustain from the fact of his debentures having been repledged before default made. Still, if the principles of law, as laid down in decided cases, satisfactorily support the proposition above stated, this Court must give effect to them. There is a well recognised distinction between a *lien* and a *pledge*, as regards the powers of a person entitled to a lien and the powers of the person who holds goods upon an agreement of deposit by way of pawn or pledge for the due payment of money. In the case of simple lien there can be no power of sale or disposition of the goods, which is inconsistent with the retention of the possession by the person entitled to the lien; whereas, in the case of a pledge or pawn of goods, to secure the payment of money at a certain day, on default by the pawnor, the pawnee may sell the goods deposited and realize the amount, and become a trustee for the overplus for the pawnor; or, even if no day of payment be named, he may, upon waiting a reasonable time, and taking the proper steps, realize his debt in like manner. It is said by Mr. Justice Story (1) that "the foundation of the distinction rests in this, that the contract of pledge carries an implication that the security shall be made effectual to discharge the obligation; but, in the case of a lien, nothing is supposed to be given but a right of retention or detainer, unless under special circumstances." The question thus arises, is the right of retention in case of a lien, either by a custom or contract, otherwise different from a deposit, by way of pledge for securing the due payment of money, than in the incidental power of sale in the latter case on condition broken? In other words, on a contract of pledge, is it implied that the pledgee shall not part with the possession of the thing pledged until default in payment; and, if so, is that of the essence of the contract, *so that the violation of it makes void the contract?*

In the case of *Legg* v. *Evans* (2), an action of trover having

(1) On Bailments, tit. Pawns or Pledges, s. 311. (2) 6 M. & W. 36, 41.

been brought against the defendants, as sheriff of Middlesex, to recover the value of some pictures and picture frames, the defendants justified under an execution against the goods and chattels of the plaintiff, to which the plaintiff replied setting up a lien in respect of work done upon such goods and chattels, which had been delivered to him in the way of his trade by one Williams, and further set up an agreement between the plaintiff and Williams, that the plaintiff should draw and endorse certain bills of exchange for the use of Williams, and should have a right to hold the said goods for securing the payment by Williams of the amount of the said bills of exchange; and he alleged that the said money and bills of exchange then remained wholly unpaid. The Court of Exchequer held, on demurrer to the replication, that it was a good answer to the plea; and Parke, B., is reported to have said: "If we consider the nature of a lien and *the right* which it confers, it will be evident that it cannot form the subject-matter of a sale. A lien is a *personal right* which cannot be parted with, and continues only so long as the possessor holds the goods. It is clear, therefore, that the sheriff cannot sell an interest of this description, which is a personal interest in the goods;" and farther on he said, "Here the interest cannot be transferred to any other individual, it continues only as long as the holder keeps possession of the subject-matter of the lien, either by himself or his servant." In that case there was superadded to the lien in respect of work done an agreement that the person entitled to the lien should have a right to hold the said goods and chattels for securing the payment of the bills of exchange therein mentioned, and which then remained wholly unpaid. That case was treated as a simple case of lien or right "to hold," to secure the payment, not only of the amount due for work done on the goods by Williams, but also of the bills drawn and endorsed by him. It is, therefore, an authority to the effect that in the case of lien, even to secure payment of money advanced, there is no implication of any power to sell or otherwise dispose of the subject-matter of the lien, because retention of possession by the party entitled to the lien is an essential ingredient in it.

It appears, therefore, that there is a real distinction between a deposit by way of pledge for securing the payment of money, and

1866

DONALD v. SUCKLING.

a right to hold by way of lien to secure the same object. In *Pothonier* v. *Dawson* (1) cited in argument in *Legg* v. *Evans* (2), Gibbs, C.J., said: "Undoubtedly, as a general proposition a right of lien gives no right to sell the goods. But when goods are *deposited by way of security*, to indemnify a party against a loan of money, it is more than a pledge. (3) The lender's rights are more extensive than such as accrue under an ordinary lien in the way of trade."

It appears to me that considerable confusion has been introduced into this subject by the somewhat indiscriminate use of the words "special property," as alike applicable to the right of personal retention in case of a lien, and the actual interest in the goods created by the contract of pledge to secure the payment of money. In *Legg* v. *Evans* (4) the nature of a lien is defined to be a "personal right which cannot be parted with;" but "the contract of pledge carries an implication that the security shall be made effectual to discharge the obligation." (5) In each case the *general property remains in the pawnor;* but the question is, as to the nature and extent of the interest, or special property, passing to the bailee, in the two cases. Mr. Justice Story, in his Treatise on Bailments (6), thus describes the right and interest of the pawnee: "He may, by the common law, deliver over the pawn into the hands of a stranger for safe custody, without consideration, or he may sell or assign all his interest in the pawn, or he may convey the same interest, conditionally, by way of pawn, to another person, without in either case destroying or invalidating his security; but if the pawnee should undertake to pledge the property (not being negotiable securities) for a debt beyond his own, or to make a transfer thereof to his own creditor as if he were the absolute owner, it is clear that in such a case he would be guilty of a breach of trust, and his creditor would acquire no title beyond that held by the pawnee. The only question is, whether the creditor should be entitled to retain the pledge until the original debt was discharged, or whether the owner might recover the pledge in the

(1) Holt, N. P. at p. 385.
(2) 6 M. & W. at p. 40.
(3) Quære, whether "pledge" should not be read "lien."
(4) 6 M. & W. at p. 42.
(5) Story on Bailments, s. 311.
(6) s. 324.

same manner as in the case of a naked tort, without any qualified right in the first pawnee."

In *M'Combie* v. *Davies* (1) it appeared that a broker had for a debt of his own pledged with the defendant certain tobacco of his principal's, upon which he had a lien, and in an action brought by the principal against the defendant in trover for the tobacco, Lord Ellenborough being of opinion "that the lien was personal and could not be transferred by the tortious act of the broker pledging the goods of his principal," the plaintiff obtained a verdict; and upon motion for a new trial Lord Ellenborough said that "nothing could be clearer than that liens were personal, and could not be transferred to third persons by any *tortious* pledge of the principal's goods;" but he afterwards added "that he would have it fully understood that his observations were applied to a *tortious* transfer of the goods of the principal by the broker undertaking to *pledge* them *as his own*, and not to the case of one who, intending to give a security to another to the extent of his lien, delivers over the actual possession of the goods, on which he has the lien, to that other, with notice of his lien, and appoints that other as his servant to keep possession of the goods for him."

It would, therefore, seem that in the case of a broker or factor for sale, before the Factors Acts, although he had no power to pledge his principal's goods, except to the extent of his own lien, with notice of the extent of his interest, yet where he pledged the goods on which he had a lien tortiously, neither the factor nor his pawnee could retain them even for the payment of the amount of the original lien. The case of *M'Combie* v. *Davies* (1) shews that the factor's or broker's lien, although simply a right to retain possession as between him and his principal, might be transferred and made a security to a third person, provided he professed to assign it only as a security to the like amount as that due to himself. Still the character of the transaction is that of lien, and not of deposit by way of pledge; and although the goods were entrusted to the broker for sale, and up to the time of sale remained in his hands upon a personal right to retain them for advances, yet he could not pledge them, and if he did, the act was an essential vio-

(1) 7 East, 5; see pp. 6 and 7.

1866

DONALD v. SUCKLING.

lation of the relation betwixt him and his principal, and entitled the latter at once to the recovery of the value of the goods in trover. "But the relation of principal and factor, where money has been advanced on goods consigned for sale, is not that of pawnor and pawnee," as was said by the Court in *Smart* v. *Sandars*. (1)

There would therefore appear to be some real difference in the incidents between a simple lien, like that in *Legg* v. *Evans* (2), and the lien of a broker or factor before the Factors Act, and the case of a deposit by way of pledge to secure the repayment of money, which latter more nearly resembles an ordinary mortgage, except that the pawnor retains the general property in the goods pledged which the mortgagor does not in the case of an ordinary mortgage. (3) A lien, as we have seen, gives only a personal right to retain possession. A factor's or broker's lien was apparently attended with the additional incident, that to the extent of his lien he might transfer even the possession of the subject-matter of the lien to a third person, "appointing him as his servant to keep possession for him." In a contract of pledge for securing the payment of money, we have seen that the pawnee may sell and transfer the thing pledged on condition broken; but what implied condition is there that the pledgee shall not in the meantime part with the possession thereof to the extent of his interest? It may be that upon a deposit by way of pledge, the express contract between the parties may operate so as to make a parting with the possession, even to the extent of his interest, before condition broken, so essential a violation of it as to revest the right of possession in the pawnor; but in the absence of such terms, why are they to be implied? There may possibly be cases in which the very nature of the thing deposited might induce a jury to believe and find that it was deposited on the understanding that the possession should not be parted with; but in the case before us we have only to deal with the agreement which is stated in the plea. The object of the deposit is to secure the repayment of a loan, and the effect is to create an interest and a right of property in the pawnee, to the extent of the loan, in the goods deposited; but what is the authority for

(1) 3 C. B. at pp. 400—401; and see S. C. after amendment of pleadings, 5 C. B. at p. 917.

(2) 6 M. & W. 36.

(3) Notes to *Coggs* v. *Bernard*, 1 Smith's L. C. 194, 5th ed.

saying that until condition broken the pawnee has only a personal right to retain the goods in his own possession?

In *Johnson* v. *Stear* (1), one Cumming, a bankrupt, had deposited, with the defendant 243 cases of brandy, to be held by him as a security for the payment of an acceptance of the bankrupt for 62*l.* 10*s.*, discounted by the defendant, and which would become due January 29, 1863, and in case such acceptance was not paid at maturity, the defendant was to be at liberty to sell the brandy and apply the proceeds in payment of the acceptance. On the 28th January, before the acceptance became due, the defendant contracted to sell the brandy to a third person, and on the 29th delivered to him the dock warrant, and on the 30th such third person obtained actual possession of the brandy. In an action of *trover*, brought by the assignee of the bankrupt, the Court of Common Pleas held that the plaintiff was entitled to recover, on the ground that the defendant wrongfully assumed to be owner, in selling; and although that alone might not be a conversion, yet, by delivering over the dock warrant to the vendee in pursuance of such sale, he "interfered with the right which the bankrupt had on the 29th if he repaid the loan"; but the majority of the Court (Erle, C.J., Byles and Keating, JJ.) held that the plaintiff was only entitled to nominal damages, on the express ground, "that the deposit of the goods in question with the defendant to secure repayment of a loan to him on a given day, with a power to sell in case of default on that day, created "*an interest and a right of property in the goods, which was more than a mere lien;* and the wrongful act of the pawnee *did not annihilate the contract between the parties nor the interest of the pawnee in the goods* under that contract." (2) From that view of the law, as applied to the circumstances of that case, Mr. Justice Williams dissented, on the ground "that the bailment was terminated by the sale before the stipulated time, and consequently that the title of the plaintiff to the goods became as free as if the bailment had never taken place." (3) Although the dissent of that most learned judge diminishes the authority of that case as a decision on the point, and

(1) 15 C.B. (N.S.) 330; 33 L.J. (C.P.) 130.

(2) See 15 C.B. (N.S.) at pp. 334-5; 33 L.J. (C.P.) at p. 131.

(3) See 15 C.B. (N.S.) at p. 340; 33 L.J. (C.P.) at p. 134.

1866

DONALD v. SUCKLING.

although it may be open to doubt whether in an action of *trover* the defendant ought not to have succeeded on the plea of not possessed, and whether the plaintiff's only remedy for damages was not by action on the contract, I am nevertheless of opinion that the substantial ground upon which the majority of the Court proceeded, viz. that the "act of the pawnee did not annihilate the contract, nor the interest of the pawnee in the goods," is the more consistent with the nature and incidents of a deposit by way of pledge. I think that when the true distinction between the case of a deposit, by way of pledge, of goods, for securing the payment of money, and all cases of *lien*, correctly so described, is considered, it will be seen that in the former there is no implication, in general, of a contract by the pledgee to retain the personal possession of the goods deposited; and I think that, although he cannot confer upon any third person a better title or a greater interest than he possesses, yet, if nevertheless he does pledge the goods to a third person for a greater interest than he possesses, such an act does not *annihilate the contract of pledge* between himself and the pawnor; but that the transaction is simply inoperative as against the original pawnor, *who upon tender of the sum secured immediately becomes entitled to the possession of the goods*, and can recover in an action for any special damage which he may have sustained by reason of the act of the pawnee in repledging the goods; and I think that such is the true effect of Lord Holt's definition of a "vadium or pawn" in *Coggs* v. *Bernard* (1); although he was of opinion that the pawnee could in no case use the pledge if it would thereby be damaged, and must use due diligence in the keeping of it, and says that the creditor is bound to restore the pledge upon payment of the debt, because, by detaining it after the tender of the money, he is a wrongdoer, his special property being determined; yet he nowhere says that the misuse or abuse of the pledge before payment or tender annihilates the contract upon which the deposit took place.

If the true distinction between cases of lien and cases of deposit by way of pledge be kept in mind, it will, I think, suffice to determine this case in favour of the defendant, seeing that no tender of the sum secured by the original deposit is alleged to have been

(1) 2 Ld. Raym. at pp. 916—917.

made by the plaintiff; and considering the nature of the things deposited, I think that the plaintiff can have sustained no real damage by the repledging of them, and that he cannot successfully claim the immediate right to the possession of the debentures in question.

I am therefore of opinion that our judgment should be for the defendant.

BLACKBURN, J. [After stating the pleadings.] The plea does not expressly state whether the deposit with the defendant by Simpson was before or after the dishonour of the bill of exchange; and as against the defendant, in whose knowledge this matter lies, it must be taken that it was before the bill was dishonoured, and consequently at a time when Simpson was not yet entitled by virtue of his agreement with the plaintiff to dispose of the debentures. We cannot construe the plea as stating that Simpson agreed to transfer to the defendant, as indorsee of the bill, the security which Simpson had over the debentures, and no more. We must, I think, as against the defendant, construe the plea as stating that Simpson deposited the debentures, professing to give a security on them for repayment of a debt of his own, which may or may not have exceeded the amount of the bill of exchange, but was certainly different from it. And it is quite clear that Simpson could not give the defendant any right to detain the debentures after the bill of exchange was satisfied, so that a replication that the plaintiff had paid, or was ready and willing to pay the bill would have been good. The defendant could not in any view have a greater right than Simpson had. But there is no such replication; and so the question which is raised on this record, and it is a very important one, is, whether the plaintiff is entitled to recover in detinue the possession of the debentures, he neither having paid nor tendered the amount for which he had pledged them with Simpson. In detinue the plaintiff's claim is based upon his right to have the chattel itself delivered to him; and if there still remain in Simpson, or in the defendant as his assignee, any interest in the goods, or any right of detention inconsistent with this right in the plaintiff, the plaintiff must fail in detinue, though he may be entitled to maintain an action of tort against

1866

DONALD v. SUCKLING.

Simpson or the defendant for the damage, if any, sustained by him in consequence of their unauthorized dealing with the debentures.

The question, therefore, raised on the present demurrer is, whether the deposit by Simpson of the debentures with the defendant, as stated in the plea, put an end to that interest and right of detention till the bill of exchange was honoured, which had been given to Simpson by the plaintiff's original contract of pledge with him.

There is a great difference in this respect between a pledge and a lien. The authorities are clear that a right of lien, properly so called, is a mere personal right of detention; and that an unauthorized transfer of the thing does not transfer that personal right. The cases which established that, before the Factors Acts, a pledge by a factor gave his pledgee no right to retain the goods, even to the extent to which the factor was in advance, proceed on this ground. In *Daubigny* v. *Duval* (1), Buller, J., puts the case on the ground that, "a lien is a personal right and cannot be transferred to another." In *M'Combie* v. *Davies* (2), Lord Ellenborough puts the decision of the Court on the same ground, saying that "nothing could be clearer than that liens were personal and could not be transferred to third persons by any tortious pledge of the principal's goods." Story in his Treatise on Bailments, ss. 325, 326, and 327, is apparently dissatisfied with these decisions, thinking that a factor, who has made advances on the goods consigned to him, ought to be considered as having more than a mere personal right to detain the goods, and that a pledgee from him ought to have been considered entitled to detain the goods until the lien of the factor was discharged. This is a question which can never be raised in this country, for the legislature has intervened, and in all cases of pledges by agents, within the Factors Acts, the pledge is now available to the extent of the factor's interest.

But, on the facts stated on the plea, Simpson was not an agent within the meaning of the Factors Acts; and we have to consider whether the agreement stated to have been made between the plaintiff and him did confer something beyond a mere lien properly so called, an interest in the property, or real right, as

(1) 5 T. R. at p. 606. (2) 7 East, at p. 6.

distinguished from a mere personal right of detention. I think that both in principle and on authority, a contract such as that stated in the plea, pledging goods as a security, and giving the pledgee power in case of default to dispose of the pledge (when accompanied by an actual delivery of the thing), does give the pledgee something beyond a mere lien; it creates in him a special property or interest in the thing. By the civil law such a contract did so, though there was no actual delivery of possession; but the right of hypothec is not recognised by the common law. Till possession is given the intended pledgee has only a right of action on the contract, and no interest in the thing itself: *Howes* v. *Ball.* (1) I mention this because in the argument several authorities, which only go to shew that a delivery of possession is, according to the English law, necessary for the creation of the special property of the pawnee, were cited as if they determined that possession was necessary for the continuance of that property.

The effect of the civil law is thus stated by Story, in his Treatise on Bailments, s. 328: "It enabled the pawnee to assign over, or to pledge the goods again, to the extent of his interest or lien on them; and in either case the transferee was entitled to hold the pawn, until the original owner discharged the debt for which it was pledged. But beyond this, the (second) pledge was inoperative and conveyed no title, according to the known maxim, nemo plus juris ad alium transferre potest quam ipse haberet."

In England there are strong authorities that the contract of pledge, when perfected by delivery of possession, creates an interest in the pledge, which interest may be assigned. This was the very point decided by the Court in *Mores* v. *Conham* (2), where the Court say that the pawnee is responsible "if he misuseth the pawn; also he hath such interest in the pawn as he may *assign over*, and the *assignee* shall be subject to detinue if he detains it *upon payment of the money* by the owner." It is true that one judge, Foster, J., dissented on this very point. That may so far weaken the authority of the decision; but it shews that there could be no mistake in the reporter, and no oversight on the part of the majority, but that it was a deliberate decision.

It is laid down by Lord Holt in his celebrated judgment in

(1) 7 B. & C. 481. (2) Owen, 123, 124.

1866

DONALD v. SUCKLING.

*Coggs* v. *Bernard* (1), that a pawnee "has a special property, for the pawn is a securing to the pawnee that he shall be repaid his debt, and to compel the pawnor to pay him," language certainly seeming to indicate an opinion that he has an interest in the thing, or real right, as distinguished from a mere personal right of detention. And Story in his Treatise on Bailments, s. 327, says: "But whatever doubt may be indulged as to the case of a factor, it has been decided," that is, in America, "that in case of a strict pledge, if the pledgee transfers the same to his own creditor, the latter may hold the pledge until the debt of the original owner is discharged."

In Whitaker on Lien, published in 1812, p. 140, the law is laid down to be, that the pawnee has a special property beyond a lien. I do not cite this as an authority of great weight, but as shewing that this was an existing opinion in England before Story wrote his treatise. But there is a class of cases in which a person having a limited interest in chattels, either as hirer or lessee of them, dealing tortiously with them, has been held to determine his special interest in the things, so that the owner may maintain trover as if that interest had never been created. But I think in all these cases the act done by the party having the limited interest was wholly inconsistent with the contract under which he had the limited interest; so that it must be taken from his doing it, that he had renounced the contract, which, as was said in *Fenn* v. *Bittleston* (2), operates as a disclaimer of a tenancy at common law, or as it is put by Williams, J., in *Johnson* v. *Stear* (3), he may be said to have violated an implied condition of the bailment. Such is the case where a hirer of goods, who is not to have more than the use of them, destroys them or sells them; that being so wholly at variance with the purpose for which he holds them, that it may well be said that he has renounced the contract by which he held them, and so waived and abandoned the limited right which he had under that contract. It may be a question whether it would not have been better if it had been originally determined that, even in such cases, the owner should bring a special action on the case, and recover the damage

(1) 2 Ld. Raym. at p. 916.
(2) 7 Ex. at p. 160; 21 L. J. (Ex.) at p. 43.
(3) 15 C. B. (N.S.) 330, 341; 33 L. J. (C.P.) 130, 134.

which he actually sustained, which may in such cases be very trifling, though it may be large, instead of holding that he might bring trover, and recover the whole value of the chattel without any allowance for the special property. But I am not prepared to dissent from these cases, where the act complained of is one wholly repugnant to the holding, as I think it will be found to have been in every one of the cases in which this doctrine has been acted upon. But where the act, though unauthorized, is not so repugnant to the contract as to shew a disclaimer, the law is otherwise. Thus, where the hirer of a horse for two days to ride from Gravesend to Nettlested deviated from the straight way and rode elsewhere, it was held that the hirer had a good special property for the two days, and although he misbehaved by riding to another place than was intended, that was to be punished by an action on the case, and not by seizing the gelding: *Lee v. Atkinson.* (1) This certainly was a much more equitable decision than if a rough rule had been laid down that every deviation from the right line, however small, was to operate as a forfeiture of the right to use the horse for which the hirer had paid; and it may be reconciled to the decisions already referred to, because the wrongful use, though wrongful, was not such as to shew a renunciation of the contract with the owner of the horse. Now I think that the subpledging of goods, held in security for money, before the money is due, is not in general so inconsistent with the contract, as to amount to a renunciation of that contract. There may be cases in which the pledgor has a special personal confidence in the pawnee, and therefore stipulates that the pledge shall be kept by him alone, but no such terms are stated here, and I do not think that any such term is implied by law. In general all that the pledgor requires is the personal contract of the pledgee that on bringing the money the pawn shall be given up to him, and that in the meantime the pledgee shall be responsible for due care being taken for its safe custody. This may very well be done though there has been a subpledge; at least the plaintiff should try the experiment whether, on bringing the money for which he pledged those debentures to Simpson, he cannot get them. And the assignment of the pawn for the purpose of raising money (so

(1) Yelv. 172.

1866

DONALD v. SUCKLING.

long at least as it purports to transfer no more than the pledgee's interest against the pledgor) is so far from being found in practice to be inconsistent with or repugnant to the contract, that it has been introduced into the Factors Acts, and is in the civil law (and according to *Mores* v. *Conham* (1) in our own law also) a regular incident in a pledge. If it is done too soon, or to too great an extent, it is doubtless unlawful, but not so repugnant to the contract as to be justly held equivalent to a renunciation of it.

The cases of *Bloxam* v. *Sanders* (2) and *Milgate* v. *Kebble* (3) are cases of unpaid vendors, and therefore are not authorities directly applicable to a case of pledge. But the position of a partially unpaid vendor, who irregularly sells the goods which have only been partially paid for, is very analogous to that of a pledgee; and in *Milgate* v. *Kebble* (4), Tindal, C.J., is reported to have used language that seems to indicate that in his opinion a pledgor could not have maintained trover any more than the vendee in that case.

But the latest case, and one which I think is binding on this Court, is that of *Johnson* v. *Stear* (5); and I think that the decision of the majority of the Court of Common Pleas in that case is an authority, that at all events there remains in the pawnee an interest, not put an end to by the unauthorized transfer, such as is inconsistent with a right in the pawnor to recover in detinue. In that case the goods had been pledged as a security for a bill of exchange, with a power of sale if the bill was not paid at maturity. The pledgee sold the goods the *day before* he had a right to do so. The assignees of the bankrupt pledgor brought trover, and sought to recover the full value of the goods without any reduction. Williams, J., thought that they were so entitled, giving as his reason, "that the bailment having been terminated by the wrongful sale, the plaintiff might have resumed possession of the goods freed from the bailment, and might have held them rightfully when so resumed, as the absolute owner against all the world." (6) And if

(1) Owen, 123.
(2) 4 B. & C. 941.
(3) 3 M. & G. 100.
(4) 3 M. & G. at p. 103.
(5) 15 C. B. (N.S.) 330; 33 L. J. (C.P.) 130.
(6) 15 C. B. (N.S.) at p. 341; 33 L. J. (C.P.) at p. 134.

this was correct, the present plaintiff is entitled to judgment. But the majority of the Court decided that "the deposit of the goods in question with the defendant to secure repayment of a loan to him on a given day, with power to sell in case of default on that day, created an interest and a right of property in the goods which was *more* than a mere lien; and the wrongful act of the pawnee did not annihilate the contract between the parties, *nor the interest* of the pawnee in the goods under that contract." (1) This can be reconciled with the cases above cited, of which *Fenn* v. *Bittleston* (2) is one, by the distinction that the sale, though wrongful, was not so inconsistent with the object of the contract of pledge as to amount to a repudiation of it, though I own that I do not find this distinction in the judgment of *Johnson* v. *Stear*. (3) It may be that the conclusion from these premises ought to have been, that the defendant was entitled to the verdict, on the plea of not possessed in trover, unless the Court thought fit to let the plaintiff, on proper terms, amend by substituting a count for the improper sale; but this point as to the pleading does not seem to have been presented to the Court of Common Pleas. The fact that they differed from Williams, J., shews that after consideration they *meant* to decide, that the pledge gave a special property, which still continued; and though I have the highest respect for the authority of Williams, J., I think we must, in a court of co-ordinate jurisdiction, act upon the opinion of the majority, even if I did not think, as I do, that it puts the law on a just and convenient ground. And as already intimated, I think that unless the plaintiff is entitled to the uncontrolled possession of the things, he cannot recover in detinue.

For these reasons, I think we should give judgment for the defendant.

MELLOR, J., read the judgment of

COCKBURN, C.J. The question in this case is, whether, when debentures have been deposited as security for the payment of a bill of exchange, with a right on the part of the depositee to sell

(1) 15 C. B. (N.S.) at pp. 334—335; 33 L. J. (C.P.) at p. 131.

(2) 7 Ex. 152; 21 L. J. (Ex.) 41.

(3) 15 C. B. (N.S.) 330; 33 L. J. (C.P.) 130.

1866

DONALD v. SUCKLING.

or otherwise dispose of the debentures in the event of nonpayment of the bill,—in other words, as a pledge,—and the pawnee pledges the securities to a third party on an advance of money, the original pawnor, the bill of exchange remaining unpaid, can treat the contract between himself and the first pawnee as at an end, and, without either paying or tendering the amount of the bill of exchange, for the payment of which the security had been pledged, bring an action of detinue to recover the thing pledged from the holder to whom it has been transferred.

I think it unnecessary to the decision in the present case to determine whether a party, with whom an article has been pledged as a security for the payment of money, has a right to transfer his interest in the thing pledged (subject to the right of redemption in the pawnor) to a third party. I should certainly hesitate to lay down the affirmative of that proposition. Such a right in the pawnee seems quite inconsistent with the undoubted right of the pledgor to have the thing pledged returned to him immediately on the tender of the amount for which the pledge was given. In some instances it may well be inferred from the nature of the thing pledged,—as in the case of a valuable work of art,—that the pawnor, though perfectly willing that the article should be intrusted to the custody of the pawnee, would not have parted with it on the terms that it should be passed on to others and committed to the custody of strangers. It is not, however, necessary to decide this question in the present case. The question here is, whether the transfer of the pledge is not only a breach of the contract on the part of the pawnee, but operates to put an end to the contract altogether, so as to entitle the pawnor to have back the thing pledged without payment of the debt. I am of opinion that the transfer of the pledge does not put an end to the contract, but amounts only to a breach of contract, upon which the owner may bring an action,—for nominal damages if he has sustained no substantial damage; for substantial damages, if the thing pledged is damaged in the hands of the third party, or the owner is prejudiced by delay in not having the thing delivered to him on tendering the amount for which it was pledged. We are not dealing with a case of lien, which is merely the right to retain possession of the chattel, and which right is immediately lost on the possession

being parted with, unless to a person who may be considered as the agent of the party having the lien for the purpose of its custody. In the contract of pledge, the pawnor invests the pawnee with much more than the mere right of possession. He invests him with a right to deal with the thing pledged as his own, if the debt be not paid and the thing redeemed at the appointed time.

It seems to me that the contract continues in force, and with it the special property created by it, until the thing pledged is redeemed or sold at the time specified. The pawnor cannot treat the contract as at an end, until he has done that which alone enables him to divest the pawnee of the inchoate right of property in the thing pledged, which the contract has conferred on him.

The view which I have taken of this case, and which I should have arrived at independently of authority, is fully borne out by the decision of the majority of the Court of Common Pleas in the case of *Johnson* v. *Stear*. (1) There, goods, which had been pledged as security for the payment of a bill of exchange, having been sold before the falling due of the bill, the Court held, on an action of trover being brought to recover the goods, that, although the owner was entitled to maintain an action against the pawnee for a breach of contract in parting with the goods, yet that the contract itself was not put an end to by the tortious dealing with the goods by the pawnee, so as to entitle the owner to bring an action to recover the goods as if the contract never had existed. This decision appears to me to be a direct authority on the present case, and to be binding upon us. It is true that Mr. Justice Williams dissented from the other three judges constituting the court, holding that the contract was put an end to, and the plaintiff remitted to his absolute right of ownership by the conversion of the goods by the pawnee. But however I may regret to differ from that very learned judge, I concur, for the reasons I have given, with the majority of the Court of Common Pleas in holding, that a pawnor cannot recover back goods (and the same principle obviously would apply to debentures) pledged as security for the payment of a debt or bill

(1) 15 C.B. (N.S.) 330; 33 L.J. (C.P.) 130.

1866

DONALD. v. SUCKLING.

of exchange, until he has paid or tendered the amount of the debt.

I am therefore of opinion that our judgment should be in favour of the defendant.

*Judgment for the defendant.*

Attorneys for plaintiff: *Keighley & Gething.*
Attorneys for defendant: *Edmands & Mayhew.*

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*May* 23.

NICHOLSON *v.* THE GUARDIANS OF THE BRADFIELD UNION.

*Corporation—Contract not under seal—Executed consideration—Goods supplied for purposes of Corporation—Guardians of Poor Law Union.*

The plaintiff supplied coals from time to time to the defendants, the guardians of a poor-law union, for the use of their workhouse, under articles of agreement between the plaintiff and the defendants, executed by the plaintiff, but not under the seal of the defendants. The defendants received and used some of the coals. In an action for goods sold and delivered:—

*Held*, that as the goods had been supplied and accepted by the defendants, and were such as must necessarily be from time to time supplied for the very purposes for which the defendants were incorporated, the defendants were liable to pay for the coals although the contract was not under seal.

*Clarke* v. *Cuckfield Union* (1) followed.

CASE stated after issue joined.

The declaration was for coals sold and delivered; pleas, never indebted, and that the contract with the defendants, a corporation, was not under seal.

There were other pleas relying on the defendants' right to return the coals as not according to contract.

The facts sufficiently appear from the judgment of the Court.

May 9. *Powell, Q.C.* (*H. James* with him), for the plaintiff. The defendants are liable to pay for the coals supplied to them by the plaintiff. It will be said that a corporation is not liable on a contract unless it be under seal, and in the present case the contract was verbal. But *Clarke* v. *Cuckfield Union* (1), followed by *Haigh* v. *North Bierley Union* (2), both of them cases decided in

(1) 21 L. J. (Q.B.) 349. (2) E. B. & E. 873; 28 L. J. (Q.B.) 62.

this court, are authorities for the proposition that "whenever a corporation is created for particular purposes, which involve the necessity for frequently entering into contracts for goods or works essentially necessary for carrying the purposes, for which the corporation is created, into execution, a demand in respect of goods or works which have actually been supplied to and accepted by the corporation, and of which they have had the full benefit, may be enforced by action of assumpsit, and the corporation will be liable, though the contract was by parol only and not by deed." So in *Sanders* v. *St. Neot's Union* (1), where the works, though done under a verbal order, were adopted by the corporation for purposes connected with the corporation, they were held liable. *Paine* v. *Strand Union* (2) is distinguishable. The action was there brought for making a survey of the parish and supplying maps, and these things are not necessarily incident to the purposes for which the guardians are made a corporation. It must, however, be admitted that the cases of *Smart* v. *West Ham Union* (3), and *Lamprell* v. *Billericay Union* (4), are authorities against the plaintiff's contention. In the conflict of cases between this court and the Court of Exchequer, this Court will be guided by its own decisions, and it has elected in *Henderson* v. *Australian Royal Mail Steam Navigation Company* (5), and *Reuter* v. *Electric Telegraph Company* (6), to follow the cases in this court. It certainly is in accordance with justice and common sense, that when a corporation has received the benefit of a contract they should be held liable. The coals were supplied by a resolution of the Board of Guardians, and the case is precisely similar to *Clarke* v. *Cuckfield Union.* (7) *London Dock Company* v. *Sinnott* (8) is distinguishable; in that case the contract was executory. [He also contended that, on the facts, the plaintiff could not be required to take back any portion of the coals supplied.]

May 10. *Harington* (*J. O. Griffits* with him), for the defendants. It must be admitted that *Clarke* v. *Cuckfield Union* (7),

(1) 8 Q. B. 810.
(2) 8 Q. B. 326.
(3) 10 Ex. 867; 24 L. J. (Ex.) 201.
(4) 3 Ex. 283.
(5) 5 E.&B. 409; 24 L.J. (Q.B.) 322.
(6) 6 E. & B. 341; 26 L.J. (Q.B.) 46.
(7) 21 L. J. (Q.B.) 349.
(8) 8 E. & B. 347; 27 L. J. (Q.B.) 129.

1866

NICHOLSON v. BRADFIELD UNION.

and *Haigh* v. *North Bierley Union* (1), are cases in point for the plaintiff. But all the cases which are cited and commented on in those cases, with the exception of *De Grave* v. *Mayor of Monmouth* (2) and *Sanders* v. *St. Neot's Union* (3), were cases of trading corporations, and it may be conceded that corporations created for mercantile purposes are permitted to enter into certain contracts without seal. With regard to *De Grave* v. *Mayor of Monmouth* (2), although that was a decision of Lord Tenterden's, still it is a nisi prius decision, and with respect to *Sanders* v. *St. Neot's Union* (3), Parke, B., in his judgment in *Smart* v. *West Ham Union* (4), says: "In the case of *Sanders* v. *St. Neot's Union* (3) I am reported to have overruled the objection that the defendants could not contract except under seal; but that is not so. I allowed the case to proceed because I thought the objection was apparent on the record." That case as well as *Lamprell* v. *Billericay Union* (5) is in favour of the defendants. Wightman, J., in *Clarke* v. *Cuckfield Union* (6), comes to the conclusion that a corporation is liable on a verbal contract where the consideration is executed "not without much doubt," and Crompton, J., in *Haigh* v. *North Bierley Union* (7) had so much doubt on the point, that he was prepared to give the defendants leave to appeal. The authorities on the question can be marshalled in the following order—For the proposition that a corporation must contract under seal: *Arnold* v. *Mayor of Poole* (8), *East London Water Works Company* v. *Bailey* (9), *Mayor of Ludlow* v. *Charlton* (10), *Lamprell* v. *Billericay Union* (5), *Diggle* v. *Blackwall Railway Company* (11), *Copper Miners Company* v. *Fox* (12), *Paine* v. *Strand Union* (13), *London Dock Company* v. *Sinnott* (14), *Smart* v. *West Ham Union* (15), *s.c.* affirmed in error. (16) Against the proposition may be cited: *Mayor of Stafford* v. *Till* (17), *City of London Gas Light and Coke*

(1) E. B.&E. 873; 28 L.J. (Q. B.) 62.
(2) 4 C. & P. 111.
(3) 8 Q. B. 810.
(4) 10 Ex. at p. 875; 24 L. J. (Ex.) at p. 203.
(5) 3 Ex. 283.
(6) 21 L. J. (Q.B.) 349.
(7) 28 L.J. (Q.B.) 62; E.B. & E. 873.
(8) 4 M. & G. 860.
(9) 4 Bing. 283.
(10) 6 M. & W. 815.
(11) 5 Ex. 442; 19 L. J. (Ex.) 308.
(12) 20 L. J. (Q. B.) 174; 16 Q. B. 229.
(13) 8 Q. B. 326.
(14) 27 L. J. (Q.B.) 129; 8 E. & B. 347.
(15) 24 L. J. (Ex.) 201; 10 Ex. 867.
(16) 25 L. J. (Ex.) 210; 11 Ex. 867.
(17) 4 Bing. 75.

*Company* v. *Nicholls* (1), *De Grave* v. *Mayor of Monmouth* (2), *Beverley* v. *Lincoln Gas Light Company* (3), *Church* v. *Imperial Gas Company* (4), *Sanders* v. *St. Neot's Union* (5), *Clarke* v. *Cuckfield Union* (6), *Henderson* v. *Australian Mail Company* (7), *Haigh* v. *North Bierley Union.* (8) The law is laid down with much hesitation in the cases cited by the plaintiff, and on the authorities it is an open question. The ground on which the corporation, in all the cases, have been held to be liable, is that the contract has been adopted, and the corporation have received a benefit; here the contract from first to last, rightly or wrongly, has been consistently repudiated, and the plaintiff has been requested to take away the coals, as they were of inferior quality to those ordered. There is, therefore, a distinction between this case and those cited. By the consolidated orders of 24th July, 1847, it is ordered by art. 45, "That the guardians shall require tenders to be made, in some sealed paper, for the supply of all goods above the value of 50*l.*;" and by art. 48: "When any tender is accepted the party making the tender shall, in pursuance of these regulations, enter into a contract in writing with the guardians containing the terms, conditions, and stipulations mutually agreed upon." (9) So that by the rules of the Poor Law Commissioners, the guardians of a union are required to enter into written contracts for the supply of goods. Such a contract, if in writing, could only be authenticated by a seal, and to hold that a seal is not necessary would be virtually to repeal the order of the Poor Law Commissioners. [He also contended that, on the facts, the plaintiff was bound to take back the whole of the coals, and that the defendants had only used a sufficient quantity of the coals to test the quality.]

*Powell, Q.C.*, was heard in reply.

*Cur. adv. vult.*

May 23. The judgment of the Court was delivered by BLACKBURN, J. This was a case argued at the sittings, after

(1) 2 C. & P. 365.
(2) 4 C. & P. 111.
(3) 6 A. & E. 829.
(4) 6 A. & E. 846.
(5) 8 Q. B. 810.
(6) 21 L. J. (Q.B.) 349.
(7) 24 L.J. (Q.B.) 322; 5 E.&B. 409.
(8) 28 L. J. (Q.B.) 62; E. B. & E. 873.
(9) See Glen's Orders, 4th ed. p. 27.

1866

NICHOLSON v. BRADFIELD UNION.

last term, before my Brother Lush and myself. The facts were, that the Guardians of the Bradfield Union had advertised for tenders for the supply of Ruabon and Aberdare coals, for the use of the workhouse. The plaintiff, amongst others, sent in his tender for seventy tons Ruabon coals at 21*s.* 9*d.*, and sixty tons of Aberdare coals at 22*s.* 3*d.* per ton, and on the 21st June, 1864, by a resolution of the Board of Guardians, made at a board meeting duly held, his tender was accepted, and on the 22nd June the clerk of the guardians wrote to inform the plaintiff of this, and requested him to call with his sureties and execute the formal contract. This contract was in the form of a deed, purporting to be made between the plaintiff of one part and the Guardians of the Poor of the Bradfield Union of the other. The plaintiff attended and executed the deed, but not having brought his sureties with him, the execution by the guardians was postponed till he had procured them. He did afterwards procure his sureties to execute the bond, but, first on account of some informality, and afterwards in consequence of some dispute, the seal of the guardians was never, in fact, affixed to the contract. Both parties, however, acted in the interval as if the contract had been formally executed.

The plaintiff sent into the workhouse, in pursuance of orders properly given to him, four parcels of coals, for the price of which he brought this action. Two of these parcels, delivered on the 28th and 30th June, amounting together to twenty one tons, were ordered and supplied as Aberdare coals. The price of these, at the contract price, amounts to 23*l.* 7*s.*, and in fact they were such coals as, by the contract, ought to have been supplied as Aberdare coals. Two other parcels were sent in as Ruabon coals, one lot of fifteen tons nine hundred-weight, on the 1st July, which really were Ruabon coals, such as by the contract ought to have been supplied as Ruabon coals; and another lot, of seven tons eight hundred-weight, on the 2nd July, which were not, in fact, Ruabon coals at all, and not such as to satisfy the contract. The two parcels delivered as Ruabon coals were shot into the same heap, so that in consequence of the plaintiff's fault, the coal of July 1st, which was according to contract, and that of July 2nd, which was not, got mixed together. On the 2nd August, the plaintiff sent in his account for the whole

of these coals, amounting to 84*l.* 4*s.* 3*d.*, being the amount he would have been entitled to under the contract, if the coals had all been according to contract. About six tons of the Aberdare coals were used in the workhouse, and about six tons of the coal delivered in July, which consisted partly of Ruabon coal and parly of inferior coal mixed with it, were consumed in the workhouse before the inferiority of the last lot was fully brought to the notice of the Board of Guardians. On the 17th August, the clerk of the guardians, by their authority, wrote to the plaintiff, requiring him to take back the whole of the coals, making no distinction between the Aberdare coals supplied in June, which were, in fact, according to the contract, and the Ruabon coals supplied in July, which were not, in fact, according to the contract. The plaintiff refused to take back any, and brought his action for the whole sum of 84*l.* 4*s.* 3*d.* It is clear that the plaintiff cannot be in a better position than if the contract had been executed by the defendants. By the terms of the contract, the guardians were to be at liberty, in case the articles delivered were not of the quality and sort contracted for, to return the same at the expense of the contractor, or give notice for the same to be sent for and fetched away; and to obtain a supply elsewhere and charge the contractor with the extra cost of this supply. It is clear, therefore, that the defendants had a right to require the plaintiff to take away so much of the coals remaining as were not according to contract; and we think, that as the two parcels sent in in July were mixed together, so that the heap was partly Ruabon and partly not, the whole of these coals must be considered as not according to the contract, though, had they been kept separate, one parcel would have been according to contract. The plaintiff cannot, therefore, in any view, recover for the price of so much of these latter coals as were not consumed; and the defendants are also entitled to charge him with the extra cost of the supply of coal in their place; and the six tons of this inferior mixture, which were actually used, cannot be charged at the full contract price. The plaintiff, therefore, cannot recover for the whole sum he claims.

But the defendants have no right, under the contract, to require the plaintiff to remove the portion of the Aberdare coals which in August still remained unconsumed, those coals having been de-

1866

NICHOLSON v. BRADFIELD UNION.

livered in June, and being in all respects according to the contract. There is, indeed, a term in the contract that a proper bill of parcels shall be delivered with each lot of goods sent in, or the guardians may reject them; and it appears that the bills of parcels for the Aberdare coal were not sent in till some time after the delivery; but though this would have entitled the defendants to refuse to receive the goods so sent in, and probably to send back the whole if inadvertently taken in, provided they did so promptly, it did not authorise them to return a part of the goods so sent in, especially after such a lapse of time.

The plaintiff, therefore, if the contract had been sealed with the seal of the corporation, would have been entitled to recover,—but not the whole of his demand. At the time of the argument the amount of the deductions was calculated, and it appeared he would be entitled to 26*l.* 10*s.*

There remains, therefore, only the question whether the facts that the defendants are a corporation, and that the contract was not under their seal, makes any difference as to the whole or part of this demand.

Mr. Harington argued that the price of those coals which still remained unconsumed, and which the corporation were ready and willing, and offered before action, to return, stood on a different footing from the price of the portion consumed, and as to those, at least, the plaintiff could not recover, but we think that there is no such distinction. We think that if the defendants are bound to pay for any of the coals as goods sold and delivered, their liability was fixed as soon as the coals, being according to contract, were received, so that there remained nothing to be done but to pay for them; and that this liability could not be got rid of by any subsequent offer to return the coals which the plaintiff was not bound, under the contract, to accept, and which, if he had at that time accepted, would by no means have put him in the same position as if the goods had never been kept by the defendants. We think, therefore, that the only question is, whether the absence of a sealed contract does, under such circumstances, prevent the plaintiff from recovering. It is not necessary to express any opinion as to what might have been the case, if the plaintiff had been suing on this contract for a refusal to accept the coals, or any other breach of

the contract whilst still executory, or how far the principle of *London Dock Company* v. *Sinnott* (1) would then have applied to such a contract. The goods in the present case have actually been supplied to and accepted by the corporation; they were such as must necessarily be from time to time supplied for the very purposes for which the body was incorporated, and they were supplied under a contract, in fact, made by the managing body of the corporation. If the defendants had been an unincorporated body, nothing would have remained but the duty to pay for them. We think that the body corporate cannot, under such circumstances, escape from fulfilling that duty merely because the contract was not under seal. The case of *Clarke* v. *Cuckfield Union* (2) is in its facts undistinguishable from the present case. We are aware that very high authorities have questioned the soundness of that decision, and as pointed out in the judgment in that case, there are prior decisions in the Court of Exchequer which it is difficult to reconcile with it. We think, however, that as far as it extends to such a case as the present at least, the case was rightly decided; there may be cases in which the circumstances are different from those in *Clarke* v. *Cuckfield Union* (2) and the present case, and which would still be governed by the principles laid down in the decisions in the Exchequer; those we leave to be decided when they arise; but so far as those prior decisions are inconsistent with the decision in *Clarke* v. *Cuckfield Union* (2), we prefer to follow the authority of *Clarke* v. *Cuckfield Union* (2), which we think founded on justice and convenience. We, therefore, give judgment for the plaintiff for 26*l.* 10*s.*

*Judgment for the plaintiff accordingly.*

Attorneys for plaintiff: *Courtenay & Croome.*
Attorney for defendant: *Pitman.*

(1) 8 E. & B. 347; 27 L. J. (Q.B.) 129. (2) 21 L. J. (Q.B.) 349.

*June* 11.

## ATKINSON *v.* FOSBROKE.

*Practice—Interrogatories in Action of Slander—Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 51.*

In an action of slander, it being shewn that the defendant, at a certain place in the presence of certain persons, had made imputations against the plaintiff to the effect that he had committed forgery, but that the persons present refused to give the plaintiff any further particulars, the Court allowed interrogatories to be put to the defendant as to the precise words which he had used.

4 C.B. 71.-5
6 C.B. 36
6 C.B. 73
10 C.B. 226
240-2
4 G.B.D. 526

Declaration that the defendant had spoken of the plaintiff the words following:—"He was obliged to leave Oxford on account of a forgery," meaning that the plaintiff had been guilty of a felony. "He committed a forgery while he was at Oxford," meaning that the plaintiff had been guilty of a felony. By means whereof the plaintiff was excluded from the Bath and County Club, in Bath, &c.

The defendant had pleaded not guilty.

Blackburn, J., at Chambers, allowed certain interrogatories to be administered to the defendant, on affidavits disclosing the following circumstances:

The plaintiff's father, about the 10th March, 1866, had proposed the plaintiff as a temporary member of the Bath and County Club, at Bath, and was soon afterwards informed that the committee had refused to admit the plaintiff, having come to the following resolution:—"A statement having been made in public by Mr. Fosbroke" (the defendant), "and in the presence of Mr. Pym a member of the club affecting the character of Mr. T. W. Atkinson" (the plaintiff), "the committee do not feel themselves justified in admitting him as a temporary member until such accusation is refuted in as public a manner." On inquiry the secretary of the club informed the plaintiff and his father that Pym had told the committee that defendant had stated in Pym's presence in the shop of Herring and Son, tobacconists, in Bath, that the plaintiff had committed forgery on his father; but a few days after the secretary corrected this and said that the accusation was simply of forgery, and that the name of the plaintiff's father was not mentioned. The committee refused to give any further particulars

of what Mr. Pym had repeated to them; and Mr. Pym and the defendant being on friendly terms, the plaintiff was unable to get any information from Pym; and Mr. Herring, junior, who was in the shop at the time, also refused to give any information unless compelled.

On the 17th March, the plaintiff's attorneys wrote to the defendant demanding an ample and immediate apology in writing. The defendant wrote on the 19th March, requesting that he might be "furnished with a statement of the charge made against me by Mr. Atkinson." To which the attorneys replied on the same day that "the statement referred to was made in the shop of Messrs. Herring, Milson Street, and was that Mr. Atkinson had committed forgery on his father." The defendant replied on the 20th March, "I most distinctly deny ever having made such a statement as that imputed to me by you in the letter of yesterday's date." The secretary of the club having in the meantime corrected his original statement, the plaintiff's attorneys wrote to the defendant on the 23rd March, "Our letter to you of the 19th inst., was the result of information received from the secretary of the club, who now states he was somewhat in error, and should not have named Mr. Atkinson's father as the person whose name was forged. But we have ample evidence that you stated that Mr. Atkinson had committed forgery, and for that statement we require the retractation and apology in the terms of our letter of the 17th inst.; we must have it in the course of to-morrow, or an action will be commenced."

To this no reply was received; and the writ was issued on the 26th March.

The following were the interrogatories allowed: 1. Did you in the month of February last, or in the first nine days of last March, on the premises of Mr. Herring, tobacconist, Milson Street, Bath, in the presence of Mr. F. A. Pym, use any words imputing forgery to the plaintiff, to the effect that he had to leave Oxford on account of a forgery, or that the plaintiff had put another man's name on a bill of exchange, or had issued or used a bill of exchange with the name of a person written on it but not by that person, or had used a bill of exchange having the signature of a person on it who had repudiated it as his signature, or to any effect similar to any of the above, or that he had been obliged to

1866

ATKINSON v. FOSBROKE.

leave Oxford about any such transaction as above? If yea, as near as you can remember, what were the words which you so used? 2. What words, as near as you can remember, affecting the character of the plaintiff, did you use in this sense before 10th March in the presence of the said Mr. Pym, on the premises of the said Mr. Herring?

A rule having been obtained, on the same affidavits, to rescind this order,

*J. D. Coleridge, Q.C.*, and *T. W. Saunders*, shewed cause. Under the circumstances detailed in the affidavit these interrogatories were rightly allowed. The case of *Bartlett* v. *Lewis* (1), shews that it is entirely in the discretion of the Court what interrogatories they will allow, and it is no valid objection that they even tend to criminate the person interrogated. It is said that interrogatories are seldom if ever allowed in an action of slander; but that was not the ground of the decision in *Stern* v. *Sevastopulo* (2), which was relied on by the defendant at Chambers. The ground of refusing interrogatories in that case was that they were of too vague and general a character, that they were in fact fishing interrogatories. Here the plaintiff states the time, place, and the persons to whom the slander was uttered, and simply asks to have the exact words. It is observable that the defendant, having denied that he charged the plaintiff with forgery on his father, makes no denial of the more general charge. The plaintiff having applied in vain to the other persons capable of giving the information is compelled to resort to the defendant himself, and he is wholly without redress unless the Court assists him. This is precisely the case in which Erle, C.J., in *Stern* v. *Sevastopulo* (2), said he would not say that interrogatories might not be granted though in an action of slander.

*Holl*, in support of the rule. *Tupling* v. *Ward* (3) shews that the Court, in the exercise of its discretion, ought not to allow these interrogatories. In *Baker* v. *Lane* (4) the Court of Exchequer

(1) 31 L. J. (C.P.) 230; 12 C. B. (N.S.) 249.

(2) 32 L. J. (C.P.) 268; 14 C. B. (N.S.) 737.

(3) 6 H. & N. 749; 30 L. J. (Ex.) 222.

(4) 34 L. J. (Ex.) 57; 3 H. & C. 544. See this case modified and explained by the Court of Exchequer in *Bickford* v. *Darcy*, Law Rep. 1 Ex. 354.

acted in accordance with that case, and in opposition to *Bartlett* v. *Lewis* (1); and these cases at least shew that in an action of slander or libel the Court will be very chary of allowing interrogatories. The plaintiff has declared; and he can have the evidence of Messrs. Pym and Herring, he is, therefore, not driven to resort to the defendant himself.

[COCKBURN, C.J. He can have their evidence at the trial; the question is, whether he is not entitled to interrogate the defendant in order to avoid the chance of a variance at the trial.]

The judge would amend if there were a variance.

COCKBURN, C.J. I am of opinion that this rule should be discharged. I think the order of my Brother Blackburn was rightly made. I quite agree that in exercising the jurisdiction conferred upon the courts of common law by the Common Law Procedure Act, 1854, to administer interrogatories, we ought to take care that we exercise it only in favour of a party who really has a case, but is obliged to resort to the other side to make out that case. We ought not, therefore, to allow what have been called mere fishing interrogatories; but I think in the present case we may very safely exercise this jurisdiction, and for this reason: it is abundantly clear from these affidavits, uncontradicted as they are by the defendant, that the defendant has uttered some slanderous words imputing forgery to the plaintiff. The plaintiff was proposed as a member of a club and was rejected, and was informed that the cause of his rejection was a statement made publicly by the defendant affecting the plaintiff's character. Of course the plaintiff was naturally most anxious to know the terms of the accusation, and the circumstances under which it was made; and, on inquiring at the club, he was informed that Pym had told the committee that the defendant had stated in a certain shop in Bath, in Pym's presence, that the plaintiff had committed forgery; but the plaintiff was unable to obtain any information beyond the general nature of the accusation, the only persons besides the defendant himself able to give the information refusing to give it. The result is that a slanderous imputation against the plaintiff, of a definite character, is shewn to have been made by the defendant

(1) 31 L. J. (C.P.) 230; 12 C. B. (N.S.) 249.

1866

ATKINSON v. FOSBROKE.

in the presence of Pym, and repeated by Pym to the committee, but the plaintiff has no means of ascertaining the exact terms of the slander, except by extracting it through means of interrogatories from the defendant himself. It is clear that the plaintiff has a good cause of action, but he is unable to find out the precise form in which to frame it. I think, therefore, the plaintiff is entitled to have the assistance of the Court, and that the proposed interrogatories ought to be allowed.

BLACKBURN, J. I am entirely of the same opinion. In allowing the interrogatories, so far from intending to interfere with the decision of the Court of Common Pleas, in *Stern* v. *Sevastopulo* (1), I fully agreed with it; but I thought the circumstances were different, and precisely those under which, though in an action of slander, interrogatories ought to be allowed.

MELLOR, J. I am entirely of the same opinion.

*Rule discharged.*

Attorneys for plaintiff: *Stibbard & Beck.*
Attorney for defendant: *Thomas Horwood.*

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*June* 13.

THE QUEEN, *on the prosecution of* ANDREW CASSELLS, RESPONDENT; *v.* HALL, APPELLANT.

*Easter Offerings—Evidence of Custom—Terrier, construction of—Communicant—Practice on Appeal to Quarter Sessions under* 7 & 8 *Wm.* 3, c. 6, s. 7.

Terriers of the glebe lands and other rights belonging to the parish church of B., dating from 1727 to 1825, contained the following clause: "Easter Offerings. Every communicant, 2*d.*; every cow, 2*d.*; every plough, 2*d.*; every foal, 1*s.*; every hive of bees, 1*d.*; every house, 3½*d.*":—

*Held*, 1. That the terriers were evidence of such a custom as excluded the common law right (if such existed) to a payment of 2*d.* for every member of a family of the age of sixteen as an Easter offering, because it included items to which the common law right did not extend. 2. That the word communicant did not override the whole clause, but that each item was an independent charge, and payable by every parishioner whether he came within the denomination of a communicant or not. 3. That in the absence of evidence to the contrary, "communicant" meant only those who were actually attendants at the communion. 4. That the custom attached to any house as soon as built and occupied, and

(1) 32 L. J. (C.P.) 268; 14 C. B. (N.S.) 737.

1866

THE QUEEN v. HALL.

was not confined to ancient houses which were in existence when the terriers were made.

On the hearing of an appeal at quarter sessions, under 7 & 8 Wm. 3, c. 6, s. 7, against an order of justices under s. 2, for the payment of small tithes, oblations, &c., the respondent may adduce evidence additional to that given before the justices.

ON an appeal to the quarter sessions for the West Riding of Yorkshire, against an order of two justices, adjudging the appellant liable to pay to the respondent, as vicar of Batley, the oblations and obventions arising within that parish, for the year 1864, and also the sum of 5s. for costs, the sessions confirmed the order, subject to the opinion of the Court upon the following case:

The order was made under the statute 7 & 8 Wm. 3, c. 6, s. 2, and the following were the points of appeal:

1. That there is no legal custom in the parish of Batley for the payment of Easter offerings.

2. That there was no legal evidence of any custom for the payment of Easter offerings, in the parish of Batley, produced at the hearing before the justices, or of any authority for the vicar to receive any Easter dues or Easter offerings.

3. That there is not any legal terrier or other authority for the vicar to receive Easter dues or offerings within the parish of Batley.

4. That the terrier upon which the claim was founded purports to have been made before the appellant's dwelling-house was erected, and no terrier has been made since the erection of the dwelling-house, so as to make or establish any claim for Easter dues or Easter offerings in reference thereto.

5. That the appellant was not a communicant of the Church of England.

On the hearing of the appeal, Mr. Chadwick, the parish clerk, was called, and produced a terrier, bearing date 1825, entitled "A terrier of the glebe lands, and other rights, belonging to the parish church of Batley, in the West Riding of the county of York, 1825," which contained, amongst others, the following note:—"13th. Easter Offerings. Every communicant 2*d.*; every cow, 2*d.*; every plough, 2*d.*; every foal, 1*s.*; every hive of bees, 1*d.*; every house, 3½*d.*" This document did not on the face of it purport to be made by the procurement or direction of the arch-

1866

THE QUEEN v. HALL.

bishop or of the bishop of the diocese, nor did it appear that the bishop had appointed the persons to make it who had signed it. It concluded with the signature of Matthew Sedgwick, the curate, three churchwardens, and eight other persons. It was not signed by Mr. Foxley, the then vicar of the parish; nor did it appear that the eight other persons who had signed it were inhabitants of the parish at the date of the terrier, nor did it purport to have been taken on the view; nor did it state how it had been made, nor did it appear to have been duly attested by the bishop's registrar. Mr. Chadwick also produced two other terriers of the respective dates of 1781 and 1777, all of which he brought from the parish chest.

The counsel for the appellant objected to the admission of the terriers of 1781 and 1777, on the ground that the court of quarter sessions was called upon to decide on the second ground of appeal, whether the order made by the Court below was good and well founded on the evidence then brought before it, and the terrier of 1825 was alone in evidence before the justices who made the order. That the appeal was against that decision, and that, in the absence of any authority under the statute (1) giving the respondent the right to bring forward fresh evidence in support of the original complaint, the quarter sessions ought not to allow the respondent to adduce further and better evidence, as though this were an original hearing of the complaint. The objection was overruled, and the quarter sessions admitted the evidence.

Mr. Chadwick further proved that he had been parish clerk for fifty years, and that he had written the terrier dated 1825, and signed it; that he had collected the tithes and Easter offerings throughout the parish, both for the last vicar, who died twenty-five years ago, and the present one; that the Easter offerings so collected included a sum of 2*d.* for each communicant and 3½*d.* for every house. He further said that he collected from every parishioner who would pay. On cross-examination he further stated that the Rev. Thomas Foxley was vicar when the terrier of 1825 was made, and that Mr. Sedgwick was then curate; that Mr. Foxley was not at Batley at that time; that neither the bishop

(1) 7 & 8 Wm. 3, c. 6, s. 7, gives to any person aggrieved, by an order of justices under s. 2, an appeal to the quarter sessions, who "shall proceed finally to hear and determine the matter."

nor the chancellor of the diocese, nor any one representing either, was present at the meeting at which the terrier was resolved upon; that he did not take or send any copy of the terrier to the bishop's registry at York; that he did not see or hear from the chancellor of the diocese about the terrier, and that he did not know whether anybody had done so. That formerly the quakers used to refuse to pay the Easter offerings—they always refused, and other persons had refused lately. Mr. John Dickens, a clerk in the registry of the Archbishop of York, produced from the registry a number of terriers, dated respectively 1727, 1743, 1748, 1764, 1770, 1777, 1781, 1786, 1802, and 1825; all of which contained the same paragraph as that numbered 13 in the terrier of 1825, and in the same words; the terrier of 1825, from the bishop's registry, being a duplicate of that first produced by Mr. Chadwick, and in his handwriting.

The counsel for the appellant formally objected to the reception of this evidence on the ground before mentioned. The justices admitted it, and reserved the point.

Counsel for the respondent then put in evidence the endowment of the vicarage of Batley, A.D. 1235, from the archbishop's roll in the registry at York, from which it appeared that the vicarage was endowed with "omnes proventus altarii."

On behalf of the appellant it was proved that he had been four years minister of the Baptist Chapel of Batley; that his parents had never been members of the Established Church; that neither he nor his wife had ever been baptised or confirmed according to the rubric; that they had never been communicants in the Established Church, and that the house in which he lived, and in respect of which the amount of $3\frac{1}{2}d.$ was claimed, was not built at the date of the last alleged terrier.

On the part of the appellant it was contended:

1st. That this was not the hearing of an original complaint, but an appeal from a decision of justices alleged to be wrong on the evidence before them. It might well have been that on better evidence to warrant the decision of the Court below there would have been no appeal; that if the fresh evidence were admitted, this would be in fact a new trial, and not an appeal against the judgment in a former one. That the document produced before

1866

THE QUEEN v. HALL.

the justices in petty sessions was not shewn to be a valid terrier; that it did not appear by what authority it was made, or that it was made by any, nor did it appear that it was signed by the churchwardens of the parish, nor by any parishioners signifying their assent on behalf of the parish as to its correctness. For anything that appeared it was a mere private document written for the benefit of the clergyman and by his procurement; that it did not appear to have been laid up in the bishop's registry, nor to be an exemplified or examined copy of any terrier placed there. It was, therefore, invalid as a terrier, and not admissible.

2ndly. That assuming the additional evidence to be rightly admitted, and the copy of the terrier of 1825 to be valid, it could only affect such houses as were built at the time it was made, and which were fully described in the body of the document, or in the schedule thereunto annexed, as the very object of making the terriers from time to time was to include the additions and alterations made in the lands and tenements which belonged to the vicarage, and that as the appellant's house was not then in existence, the terrier in question did not in any way affect it or shew it to be a house belonging to the vicarage, or liable to pay Easter dues to the vicar, nor shew whether the house was lying within or out of the parish. The same objection also applied to the antecedent terriers if they were held to be receiveable in evidence.

3rdly. That the appellant and his wife never having been communicants of the Church of England, the customary payment alleged to be due from every communicant, could not be due from them as such, neither could it be due to the vicar as an offering for religious services rendered, as none had ever been rendered by him to the appellant or his wife.

The counsel for the respondent contended that it was the practice of the Court to receive additional evidence on appeals, and that the additional evidence ought to be admitted. That Easter offerings were due of common right, independent of custom, and even if that were not so, still the custom being established, it was unnecessary, in order to charge the appellant in respect of his house, that it should be inserted in the schedule of the terrier any more than it was necessary to insert every fresh plough, or hive of bees, brought into the parish, and that parishioners were liable to

Easter and other ecclesiastical dues, although they were not communicants.

If the Court should be of opinion that the respondent was correct in contending that the appellant was liable to Easter offerings due as of common right, or that, on the second ground of appeal, fresh evidence, in addition to what was given before the justices who made the order, was admissible on the hearing of the appeal, and also that neither of the appellant's two or three objections were well founded, the order of sessions was to be confirmed. But if the Court should be of opinion that either of the last-mentioned objections are well founded, or that the sessions were wrong in admitting fresh evidence on the hearing of the appeal, then the order was to be quashed.

April 21. *Manisty, Q.C.*, and *Hannay*, for the respondent. The first question is, whether the quarter sessions can receive evidence in addition to that given before the justices at the hearing. It has long been established that the appeal from justices to quarter sessions is not only a re-hearing, but in the nature of a new trial.

[BLACKBURN, J. There can be no doubt that the appeal from justices to quarter sessions is in the nature of a new trial, and fresh evidence is admissible on the hearing of the appeal.]

Secondly, as to the objection that the terriers of 1825 and those of 1781 and 1777 did not come from the proper repository. The church chest is the proper repository for such documents: *Armstrong* v. *Hewitt*, 4 Price, 216. But it is unnecessary to argue the point, for not only were duplicate terriers of those dates produced from the registry of the Archbishop of York, but other terriers, all of which contained the paragraph numbered 13, were also produced from the archbishop's registry. There is therefore abundant evidence of a custom to pay the oblations.

[The Court intimated that the terriers were admissible in proof of a customary right to the oblations claimed.]

Thirdly, Easter offerings are due of common right, and not by custom only; and such offerings are due by the common law at the rate of 2*d.* per head for all persons inhabiting within a parish of the age of sixteen and upwards, whether they are actually communicants, or only capable of being communicants.

1866

THE QUEEN v. HALL.

[On this point they cited the following authorities: *Lawrence* v. *Jones*, Bun. 173; also to be found in 2 Gwillim, 662; and 1 E. & Y. 801. 2 & 3 Edw. 6, c. 13, ss. 7 & 10; 1 Gibson's Codex, 705. *Egerton* v. *Still*, Bun. 198. *Carthew* v. *Edwards*, 2 E. & Y. 121, Amb. 72. *Stirling* v. *King*, 3 Wood, 87. *Bennett* v. *Tocker*, 3 Wood, 460. *Wright* v. *Elderton*, 1 Wood, 518. *Swaine* v. *Pern*, 1 Wood, 341. Bacon's Abr. Tythes (M). Toller on Tithes, 48. Stephens' Laws Relating to the Clergy, vol. i. 819. Shelford on Tithes, 306, note (k). Burn's Eccles. Law, vol. iii. Tithes, 713. Aylliffe's Parergon, 395.]

Fourthly, it will be urged that Hall's house, having been built since the terrier of 1825 was made, the charge of $3\frac{1}{2}d.$ for every house does not attach. It is, however, clear that there may be a valid custom to pay a charge in respect of houses, ancient or modern. The terriers go back as far as 1727; it cannot be meant that only houses which have existed from the time of legal memory are chargeable; the irresistible inference is that the charge is payable for every house, ancient and modern.

*Cleasby, Q.C.*, and *Campbell Foster*, for the appellant, contended, first, that Easter offerings were due by custom, and not of common right, and that they could not be claimed in respect of every person of the age of sixteen capable of receiving the communion, but only from those who actually did receive the communion. They referred to: Eagle on Tithes, vol. i. pp. 413, 414. *Popplewell* v. *Canby*, 2 Wood, 390. *Rex.* v. *Reeves*, W. Kelynge, 196; 2 E. & Y. 55. 2 Inst. 659. Watson's Clergyman's Law, 585. Burn's Eccles. Law, "Offerings," vol. iii. p. 36. Jacob's Law Dictionary, title "Offerings." 27 Hen. 8, c. 20. 32 Hen. 8, c. 7. Canon of 1603, 1 Gibson's Codex, p. 503. Canon 27 of 1603, 1 Gibson's Codex, p. 387.

Secondly, they contended that on the construction of the terriers the word "communicant" overrode the whole clause in the terrier, so that it was only a communicant's house, or the things specified in the terrier that belonged to a communicant, that were liable to the charge. They also contended that there was nothing on the face of the terrier, or in the case stated, to shew that the word communicant was used in any other than its natural sense; and that it meant a person who actually received the communion.

Thirdly, they contended that Hall's house being a modern house, and not in existence at the time the terrier of 1825 was made, the appellant was not liable to the charge made in respect of the house.

*Cur. adv. vult.*

June 13. The judgment of the Court (Blackburn, Shee, and Lush, JJ.) was delivered by

BLACKBURN, J. Two questions raised in this case were disposed of in the course of the argument. We held, and to that opinion we adhere, first, that it was competent to the respondent to produce on the hearing of the appeal evidence in support of his claim, additional to that which was given before the justices; and, secondly, that the terriers were admissible in proof of a customary right to the oblations therein mentioned.

The question principally argued before us was, whether a payment of 2*d.* per head for every member of a family of or above the age of sixteen was due of common right as an Easter offering, and several authorities in support of the affirmative of that proposition were cited. As the view we take of this case makes it unnecessary to decide this question, we desire only to say in reference to it, that when the point arises for judicial decision, we hope it will be in such a form as will admit of an appeal to a court of error.

We are of opinion that in this case there is sufficient evidence of a custom, and such an one as excludes the common law claim, supposing it to exist, because it embraces items to which the common law right does not, and never has been considered to, extend.

That evidence consisted of terriers dated respectively 1727, 1743, 1748, 1764, 1770, 1777, 1781, 1786, 1802, and 1825, each of which contains the following statement as a class of rights belonging to the parish church of Batley, viz.: Easter offerings: Every communicant, 2*d.*; every cow, 2*d.*; every plough, 2*d.*; every foal, 1*s.*; every hive of bees, 1*d.*; every house, $3\frac{1}{2}d.$ The appellant contends that the word "communicant" overrides the whole, and that unless he is chargeable with the 2*d.* as a communicant, he is not chargeable with either of the following items. But we are of opinion that this is not the proper reading of the article. We think that each item is an independent charge, and payable

1866

THE QUEEN v. HALL.

by every parishioner, whether he comes within the denomination of a communicant or not.

The appellant further contends that only such houses are chargeable as are ancient and were in existence when the terriers were made. Upon this point also we are against him, and hold that the custom attaches as soon as the house is built and is occupied. We are therefore of opinion that the assessment of $3\frac{1}{2}d.$ in respect of the house occupied by the appellant is valid, and ought to be supported.

This brings us to the main question, viz. what is the proper meaning to be put on the term "communicant"; does it mean every person whom the church in ancient times regarded as under an obligation to commune, and who was therefore virtually a "communicant," or only those who actually communed? Agreeing, as we do, that the word is capable of the wider sense, we are of opinion that the evidence fails to shew that that is the sense in which it is used in the terriers, and that in the absence of such evidence we must attribute to the word "communicant" its proper and primary meaning, and hold that it is confined to those who actually communed.

We cannot, therefore, answer the questions put to us by the sessions wholly in favour of either of the parties, and can therefore neither quash nor confirm the order, and the case must, if the parties request it, go back to the sessions; but as neither party has wholly succeeded, and neither can get costs, they will probably consent to let the matter rest.

*Case remitted accordingly.*

Attorney for respondent: *T. Brook.*
Attorney for appellant: *H. B. Clarke.*

TARNER *v.* WALKER. 1866

*Reward, Action for—Information "leading" to Apprehension of Offender—Remoteness of Cause.* *June* 8.

The defendant's shop having been broken into, and watches and jewellery stolen, the defendant advertised, "A reward will be given to any person who will give such information as shall lead to the apprehension and conviction of the thieves." In about a week, R. having brought one of the stolen watches to the plaintiff's shop, the plaintiff gave information, and R. was apprehended the same day with another of the stolen watches upon him. After two or three days, R., being in custody, told the police that some of the thieves would be found at a certain shop, and there they were apprehended a week afterwards, and subsequently convicted. In an action by the plaintiff for the reward, the jury having returned a verdict for the plaintiff:—

*Held* (by Mellor and Shee, JJ.; Blackburn, J., doubting), that the information given by the plaintiff was not so remote as that it could not be said to have "led" to the apprehension of the thieves; and that the judge had properly left the evidence to the jury, pointing out the remoteness of the information.

DECLARATION, alleging in substance, that the defendant published a handbill and advertisement, stating that certain goods described had been stolen from the defendant's shop, and that "a reward of 250*l.* will be given to any person who will give such information as shall lead to the apprehension and conviction of the thief or thieves;" that the plaintiff did give such information; and claiming the reward. (1)

Plea, that the plaintiff did not give such information as led to the apprehension and conviction of the thieves.

Issue thereon.

At the trial before Blackburn, J., at the sittings in London after Michaelmas Term, 1865, it appeared that the defendant's shop had been broken into between the evening of Saturday, February 4th, and the morning of Monday, February 6th, and a large quantity of watches and jewellery stolen; and the defendant caused handbills and advertisements to be published in the terms stated in the declaration.

On the 14th of February, one Roberts came to the shop of the

(1) There was also a claim in respect of the two watches for a proportion of a reward offered for the recovery of the stolen property; as to this claim, 11*l.* was paid into court, which the jury found sufficient; and nothing turned on that part of the case.

1866

TARNER v. WALKER.

plaintiff, who was a working jeweller, with one of the stolen watches to be altered; the plaintiff made arrangements with Roberts to call again, and gave information to the defendant and the police; and Roberts coming again on the same day to the plaintiff's shop, was apprehended with another of the stolen watches upon him. Roberts was committed to prison; and on the 17th of February, some friends having in the meantime called upon him, he told the police that he had information that some of the thieves, whose names he did not know, would be found at a certain eelpie-shop in the Whitechapel Road; it was doubtful whether or not Roberts knew of this haunt of the thieves at the time he was apprehended, but there was no doubt that he had considerable previous knowledge of the thieves. On the 24th of February, some of the thieves were apprehended at the eelpie-shop named by Roberts, and a great deal of the stolen property was found at their houses; and they were ultimately convicted of the robbery; Roberts being convicted as receiver.

The police officers who apprehended the thieves were called for the defence, and swore that the information given by Roberts had nothing to do with the apprehension of the thieves, as the police were already aware of the eelpie-shop being one of their haunts.

The learned judge left the question to the jury, whether the information given by the plaintiff "led to the apprehension of the thieves;" pointing out,—that the police said that the information given by Roberts was not new to them; that, assuming they should think that what Roberts told the police was the means of the apprehension of the thieves, still the information which the plaintiff gave, although the cause of Roberts's apprehension, was very remote from the apprehension of the thieves.

The jury found a verdict for the plaintiff.

A rule having been obtained for a new trial, on the ground that the learned judge ought to have directed the jury that the evidence was too remote: as there was nothing to shew that the information given by Roberts after his arrest was at the instance of the plaintiff, or so as to entitle the plaintiff to say that he supplied information which led to the apprehension and conviction of the thieves, (1)

(1) The rule was also obtained on the ground that the verdict was against the weight of evidence; but the Court intimated that this was the same ques-

*Parry, Serj.*, and *Laxton*, shewed cause. On the finding of the jury, it must be taken that the police acted on the information given by Roberts, and this information would never have been given had not the plaintiff caused Roberts to be apprehended. The information, therefore, given by the plaintiff was sufficiently proximate to entitle him to the reward. The information he gave related to a person having part of the stolen property upon him, and this might naturally, and in fact did, lead to further disclosures, and to the apprehension of the thieves. In *Smith* v. *Moore* (1) the words of the handbill were almost identical with the present; and Tindal, C.J., said: "The words of the placard offering the reward are large and general enough to comprehend every mode, by which information could be conveyed that might have the effect of discovering and convicting the guilty person."

*D. Seymour, Q.C.*, in support of the rule. In *Smith* v. *Moore* (1) the person whom the plaintiff caused to be apprehended was the thief, although, it is true, he was convicted on his own confession; but that is a very different case from the present. What Roberts told the police was not in any way the natural consequence of the information given by the plaintiff; it was a mere accident that Roberts himself had the knowledge: for had not his friends called upon him he would not have known of the eelpie-shop.

[BLACKBURN, J. That was Roberts's own account of how he got the knowledge; but there can be no doubt that he knew a good deal about the thieves before he was apprehended.

MELLOR, J. The apprehension of Roberts was the direct consequence of the plaintiff's information, and he was connected with the burglary at the very least as a guilty receiver, having possession of two of the stolen watches; and the natural result of his apprehension would be that he would give all the information in his power to clear himself.]

But the information which he gave the police was accidentally acquired and perfectly independent of the plaintiff; and that information was the real and only cause of the apprehension of the thieves. It cannot be said in any way to have resulted from the

tion as that of misdirection; for if the direction was right, the judge was not so dissatisfied with the verdict as to report against it.

(1) 1 C. B. 438.

1866

TARNER v. WALKER.

plaintiff's information. [He also referred to *Williams* v. *Carwardine* (1) and *Lancaster* v. *Walsh*. (2)]

BLACKBURN, J. This rule may be taken as obtained on the ground of misdirection only. I had great doubts at the trial, and although my learned Brothers think I was right in leaving the case as I did to the jury, I am rather inclined to think I was wrong. A robbery having been committed, a reward was offered "to any person who will give such information as shall lead to the apprehension and conviction of the thieves"; the plaintiff, one of the stolen watches having been offered to him by Roberts, gives information to the defendant and the police, and Roberts is apprehended at the plaintiff's shop with another of the stolen watches upon him, and committed to prison, and no doubt he was a receiver with guilty knowledge. While in prison, Roberts obtains information, or possibly he had the knowledge before, but this I think is immaterial, and he informs the police, that though not able to tell who the thieves are, they or some of them will be found at an eelpie-shop in Whitechapel, and a few days after the thieves were taken at that very shop, and much of the stolen property found at some of their houses. The jury must be taken to have found that what Roberts told the police enabled them to apprehend the thieves, and it also must be taken that Roberts would not have spoken—would not have "split" upon the thieves, had he not himself been in custody. Now Roberts was certainly taken into custody owing to the information given by the plaintiff, and therefore that information may be taken as the causa sine quâ non of the apprehension of the thieves; but the question is, was it the causa causans? Did it conduce in such a way as that it may be said to have led to the apprehension of the thieves? I had very great doubts, but I came to the conclusion that I ought to leave the question to the jury, directing their attention to the remoteness of the information given by the plaintiff, and accordingly I did leave it with that direction. The question now is, whether as a matter of law I ought not to have told the jury that the information was too remote, and I rather think, though not without considerable hesitation, that I ought so to have directed them. Long ago, Lord

(1) 4 B. & Ad. 621. (2) 4 M. & W. 16.

Bacon, in his comment on the maxim, "In jure non remota causa sed proxima spectatur," wrote: "It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore, it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any farther degree." (1) This, no doubt, is the rule adopted by the English law, but the difficulty is to apply it. My impression is that the plaintiff's information was too remote a cause. Is it not "a cause of a cause," or "a mere impulsion?" The information need not of course be legal evidence, on which actually to convict the thieves. For instance, if the plaintiff had told the police what the wife of one of the thieves had said, this, though no evidence against the thief, might yet have led to his apprehension and conviction, so as to entitle the plaintiff to the reward; and any information directly followed up by the police would have been sufficient, as if the police had set to work, and had traced back the possession of the two watches to one of the thieves and so discovered him. My difficulty is, whether, when the police acted on the information disclosed by Roberts, it must not be considered as a fresh start. I hardly dissent from the judgment of my learned Brothers; except so far as to give the defendant leave to appeal, and so put him in the same position as if I had nonsuited the plaintiff, which on the whole is what I think I ought to have done.

MELLOR, J. I think that my Brother Blackburn could not properly have nonsuited the plaintiff, as there was evidence, as it appears to me, to be submitted to the jury, on the question whether the plaintiff "gave such evidence as led to the apprehension and conviction of the thieves," within the terms of the handbill issued by the defendant. Let us see on the facts whether the information which the plaintiff gave did not lead to the apprehension of the thieves. Roberts, a receiver of part of the stolen property, comes to the plaintiff's house with a watch which the plaintiff recognises as one of the stolen watches; he arranges with Roberts to call again, and goes at once to the defendant and the police, and gives information that Roberts will come to his house with some of the stolen watches; the police are accordingly ready, and apprehend him with another of the watches

(1) Bacon's Law Tracts, p. 35.

1866

TARNER v. WALKER.

upon him. Therefore, by reason of the plaintiff's information the police get hold of one of the parties implicated in the burglary, so far, at least, as that he had possession of part of the stolen property. My Brother Blackburn thinks that if the police had followed up the clue thus given by the plaintiff, and had traced the watches to the thieves, the plaintiff's information would have been, in his opinion, the immediate cause of the apprehension of the thieves; but I am at a loss to see why, because Roberts gives information which renders further search unnecessary, the plaintiff's information was less the cause of the apprehension. I was struck by the fact pointed out by Mr. Seymour, that the disclosure by Roberts was accidental and depended on circumstances which arose after he was in prison. Now this is not made out clearly on the evidence; it may be that Roberts had the knowledge all along, and merely made the visit of his friends the cloak or excuse for giving the information, in order to make himself out as little mixed up in the affair as possible. However that may be, that was a circumstance which could not be withdrawn from the jury. Here a person clearly implicated in the matter, being apprehended on information given by the plaintiff, gives further information, upon which, as we must now take it, the actual thieves are apprehended. I cannot help thinking my Brother Blackburn's direction was quite accurate in leaving the question to the jury, telling them that the remoteness of the information given by the plaintiff was an element to be taken into account in considering whether he was entitled to the reward. I think, therefore, that the course adopted at the trial was right. I say so with very great diffidence, when the learned judge who presided had doubts at the trial which have become stronger since. I think therefore the rule should be discharged, but it is a very proper case to give leave to the defendant to appeal if he thinks proper.

SHEE, J. I also think that my Brother Blackburn was right in leaving it to the jury to say, whether the information given by the plaintiff led substantially to the apprehension and conviction of the thieves; and that he ought not to have told the jury that the information was too remote a cause of the apprehension of the thieves to entitle the plaintiff to the reward. The learned judge could not, in my opinion, upon the facts proved, have properly

nonsuited the plaintiff. I was at first struck by Mr. Seymour's observation, that when Roberts was apprehended he did not appear to have had knowledge of the persons who were the actual thieves. It is very doubtful whether he had that knowledge; but upon consideration it does not appear to me to be important, seeing that he certainly had it afterwards, whether he had it at the time of his apprehension. He was a man so connected with the burglary that he might have himself been convicted of it, by reason of his possession of part of the stolen property so recently after the robbery; he was, before he made the statement, so implicated in the guilt of the transaction as to be exceedingly likely to make a clean breast, and tell all he knew, in order to clear himself. Under these circumstances it appears to me, the plaintiff having given information which caused the apprehension of a person, who probably at the time knew all about the thieves, and who certainly knew all about them while in prison, and whose information caused their apprehension, that it cannot be said that the plaintiff did not give such information as led to the apprehension of the thieves. "Shall lead to," does not mean "shall cause," or "shall suffice for," but "shall conduce to." I think the plaintiff's information did "conduce" to the apprehension of the thieves. It was the cause of the inquiries and investigations which produced their apprehension and conviction, and that I consider sufficient to entitle the plaintiff to the reward; and I think my Brother Blackburn would have been wrong in nonsuiting, or directing the jury that the plaintiff's information was in point of law too remote.

*Rule discharged.*

Attorney for plaintiff: *W. Newman.*
Attorney for defendant: *W. Hicks.*

1866
*June 6.*

THE QUEEN, *on the prosecution of* GOODALE AND OTHERS, APPELLANTS; *v.* PHILLIPS AND ANOTHER, RESPONDENTS.

*Highway—Diversion—Validity of Certificate of Justices—5 & 6 Wm. 4, c. 50, s. 85.*

Justices, under 5 & 6 Wm. 4, c. 50, s. 85, may make a certificate for the diversion of a highway, if the new highway is nearer *or* more commodious; and a certificate is valid which alleges one alternative.

*Reg.* v. *Shiles* (1) dissented from.

The addition of fresh land to an old narrow highway, so as to widen it and make it a commodious road, is sufficient substitution of a "new highway."

*Welch* v. *Nash* (2) dissented from.

It is sufficient if the certificate state that the old highway *will be* unnecessary when the proposed alterations are completed.

ON appeal to the Surrey quarter sessions by E. Goodale and others, against a certificate of two justices, for diverting, stopping up, and opening certain highways in the parish of Mortlake, in pursuance of 5 & 6 Wm. 4, c. 50, the sessions quashed the certificate subject to the opinion of this Court on a case.

The certificate was in substance as follows:

It recited, that C. J. Phillips and J. Wigan, the respondents,—being desirous of diverting and stopping up "a certain highway called Thames Street, in the parish of Mortlake, leading from the towing path of the river Thames, opposite to the wharf of the said parish, through the respondents' property, to and joining the public road from Richmond to Mortlake at the back of the King's Arms public-house, in the High Street, Mortlake, and also of diverting and stopping up a certain branch highway or alley, called Brewhouse Alley, leading from Thames Street aforesaid, to the High Street, Mortlake, and in lieu thereof and in substitution for the same: First, of opening a new highway to commence at the said towing path, opposite the said parish wharf, and to lead into the High Street, Mortlake, by throwing into and adding to a certain highway or passage there, known as Bull's Alley, so much of their land on the east side thereof and next adjoining thereto as would make such last-mentioned way or passage 30 feet wide or thereabouts; and, secondly, of widening the public highway called the

(1) 1 Q. B. 919. (2) 8 East, 394.

High Street aforesaid, from the east corner of a wooden building called the Tithe Barn to the King's Arms corner of the said High Street, by throwing into and adding to such street a piece of land on the north side of and next adjoining to that part of the High Street, of sufficient width to make all that part of such street of the width of from 28 feet 9 inches to 40 feet and upwards,"—had given due notice in writing to the Kingston district highway board of such their desire. That their proposal was afterwards duly approved by the inhabitants of the parish in vestry. That the two justices, in pursuance of the requisition of the vestry, together duly viewed the said highways so proposed to be diverted and stopped up (describing them as above), and also the said proposed new highways, that is to say, "First, the said piece of land next adjoining to and on the east side of Bull's Alley, Mortlake, which runs from north to south from the said towing path to the said High Street, and is in length from north to south 99 feet or thereabouts, and in width at the north end thereof 12 feet 9 inches or thereabouts, and becomes wider from north to south, and is at the south end thereof 21 feet 9 inches in width or thereabouts; and, secondly, the said piece of land next adjoining to and on the north side of the High Street, Mortlake, and which extends from the east corner of the wooden building called the Tithe Barn to the King's Arms corner of the said High Street, and is in length from east to west 255 feet or thereabouts, and in width at the west end thereof 21 feet or thereabouts, and tapers to a point towards the east end thereof, but is of sufficient width throughout to increase the width of all that part of the said High Street, and to make the same of the width throughout of from 28 feet 9 inches on the east, to 40 feet and upwards on the west, and it appearing to us, the said justices, on such view, for the reasons hereinafter stated, that the said old highways called Thames Street and Brewhouse Alley may be diverted and turned as aforesaid, so as to make the same severally and respectively more commodious to the public, that is to say, by the substitution for the same of the High Street and Bull's Alley respectively aforesaid, when the same shall have been so widened as respectively aforesaid by the addition thereto of such new highways or pieces of land as respectively aforesaid, and that the said new highways

1866

THE QUEEN v. PHILLIPS.

will be more commodious to the public than the said old highways called Thames Street and Brewhouse Alley, and that the said old highways will, if such diversion or substitution be effected, become and be unnecessary and useless." That the respondents, the owners of the land through which the new highways are proposed to be made, had, by writing under their hands, consented to the same being so made; and that the proper notices had been affixed and published, and a plan delivered to the justices and verified.

The certificate then proceeded to certify, that the justices had together viewed the said highways called Thames Street and Brewhouse Alley proposed to be diverted and stopped up, and "did upon such view find, and we *do hereby certify that for the reasons hereinafter stated, the said highways called Thames Street and Brewhouse Alley may be diverted and turned in the manner aforesaid, so as to make the same severally and respectively more commodious to the public, that is to say, by the substitution for the same of the High Street and Bull's Alley, respectively aforesaid, when the same shall have been so widened as aforesaid, by the addition thereto of such new highways or pieces of land as aforesaid;* and we do further certify that we did together view the said proposed new highways" (describing the pieces of land to be added as of the length and width above mentioned, and as delineated on the plan), "and we did upon such view find, and do hereby certify that the said proposed new highway will be *more commodious* to the public than the said old highways or either of them, by reason that the said old highway called Thames Street is in the widest part thereof only 31 feet 9 inches in width or thereabouts, and becomes gradually narrower as the same approaches the said wharf and towing path, being at that end thereof only 15 feet 3 inches in width or thereabouts (including footpath way or space for the same), and by reason that the said alley called Brewhouse Alley is only of the width of from 4 feet to 4 feet 4 inches or thereabouts, and is wholly impassable by carts, whereas by the said addition to the High Street the inconvenient north-west corner of such street will be rounded off, and the approach and entrance thereto rendered much easier and safer, and the High Street will be considerably widened at and towards the west end thereof, so as to be made of the width of 40 feet and

upwards at the west end, and from thence to the point at the east end of the Tithe Barn of a width of 28 feet 9 inches or upwards throughout (the same being at present in part of the width of 22 feet only), and in no part to the west of Bull's Alley will such High Street be of less width than 25 feet 5 inches; and also by reason that the said alley called Bull's Alley, which is now in part of the width of 8 feet 3 inches only or thereabouts, will be made to be from double to treble such width throughout, whereby the traffic to and from the said wharf, and the convenience of the persons using or resorting to the same will be greatly benefited, and whereby also the said High Street will be made greatly more commodious to the public generally as well as to persons having occasion to go to or from the said wharf. And we do further certify that the said old highway called Thames Street, and the said old branch highway called Brewhouse Alley *will, if and so soon as such diversion or substitution be effected, become and be wholly unnecessary and useless by reason of the said new highways being more commodious as aforesaid,* and by reason that all persons who would otherwise have occasion to use the said old highways will be able to use the said new and widened highways in the High Street and Bull's Alley aforesaid, in lieu and stead thereof, with at least equal if not greater facility and convenience. And we do further certify that the stopping up of Thames Street will remove a source of considerable danger to persons going by the lower Richmond road from Richmond to Barnes and London, or in that direction on foggy or dark nights, inasmuch as Thames Street on such occasions appears to be or is liable to be mistaken for a part and continuation of the main highroad, and persons making such mistake and passing up the same accordingly are in danger of being precipitated into the river. And, lastly, we do certify that the several highways so respectively proposed to be stopped up or diverted as aforesaid, were and are so connected together that they cannot be separately stopped up or diverted without interfering one with the other, and may be lawfully included in and stopped up or diverted as aforesaid by virtue of one order or certificate."

On the hearing, the highway board appeared by counsel, and stated that they considered the improvement would be very beneficial to the public, and that the new way would be very much

1866

THE QUEEN v. PHILLIPS.

better than the old one. The notice and grounds of appeal having been admitted, the certificate and the plan annexed to it were put in.

It was objected on the part of the appellants, that the certificate was defective and bad in law on the face of it, on several grounds.

First, because (assuming the proposed alteration to be in fact a stopping up of the old highways) the certificate stated that the old highways, Thames Street and Brewhouse Alley, would become unnecessary when the proposed new ways should be made, and not that they were unnecessary at the then present time.

Secondly, because (assuming the proposed alteration to be in fact a diversion of the old highways or either of them) the certificate did not state that the proposed new highways would be nearer *and* more commodious to the public, but only that the same would be more commodious; and in support of this objection the case of *Reg.* v. *Shiles* (1) was cited.

Thirdly, it was objected that the proposed alterations were not in fact a diversion or turning of a highway within the meaning of the statute.

The sessions decided on the first objection in favour of the respondents, on the ground that the justices were not stopping up a road as unnecessary (in which case it would have been right to state that the road is now unnecessary), but only certifying a diversion; and that the statement that the old road "will become unnecessary," must be taken as one of the reasons why the new road would be more commodious. The sessions decided the third objection also in favour of the respondents. But they decided on the second objection in favour of the appellants, considering themselves bound by *Reg.* v. *Shiles* (1), though dissenting from it.

It being thus the opinion of the quarter sessions that the certificate must be quashed on the second ground, the sessions considered it unnecessary for the present to empanel a jury for the purpose of determining the questions of fact; and the certificate was quashed subject to a case for the opinion of the Court of Queen's Bench.

The question for the opinion of the Court was, whether the

(1) 1 Q. B. 919.

certificate was defective on the face of it and bad in law upon any one or more of the above three grounds of objection.

If the Court should be of opinion that the certificate was not bad in law on any of the said grounds, then the judgment was to be reversed, and the matter to go back to the sessions for the purpose of having the questions of fact determined, and of proceeding thereon according to law. (1)

(1) The following sections of 5 & 6 Wm. 4, c. 50, are necessary to the understanding of the case:

s. 84. "When the inhabitants in vestry assembled shall deem it expedient that any highway should be stopped up, diverted, or turned, either entirely or reserving a bridleway or footway along the whole or any part thereof, the chairman of such meeting shall, by order in writing, direct the surveyor to apply to two justices to view the same . . .: Provided, that if any other party shall be desirous of stopping up, diverting, or turning any highway as aforesaid, he shall, by a notice in writing, require the surveyor to give notice to the churchwardens to assemble the inhabitants in vestry, and to submit to them the wish of such person; and if such inhabitants shall agree to the proposal, the surveyor shall apply to the justices aforesaid for the purpose last aforesaid." . . .

s. 85. "When it shall appear upon such view of such two justices, made at the request of the surveyor as aforesaid, that any public highway may be diverted and turned, either entirely or subject as aforesaid, so as to make the same nearer or more commodious to the public; and the owner of the land or grounds through which such new highway so proposed to be made shall consent thereto by writing under his hand; or if it shall appear upon such view that any public highway is unnecessary, the said justices shall direct the surveyor to affix a notice in the form or to the effect of schedule (No. 19), in legible characters, at the place and by the side of each end of the said highway from whence the same is proposed to be turned, diverted, or stopped up," and also to insert the same notice in one newspaper and on the door of the parish church for four successive weeks next after the view . . .; "and the said several notices having been so published, and proof thereof having been given to the satisfaction of the said justices, and a plan having been delivered to them at the same time particularly describing the old and the proposed new highway, by metes, bounds, and admeasurement thereof, which plan shall be verified by some competent surveyor, the said justices shall proceed to certify under their hands the fact of their having viewed the said highway as aforesaid, and that the proposed new highway is nearer or more commodious to the public; and if nearer, the said certificate shall state the number of yards or feet it is nearer, or if more commodious, the reasons why it is so; and if the highway is proposed to be stopped up as unnecessary, either entirely or subject as aforesaid, then the certificate shall state the reason why it is unnecessary." The certificate, plan, and consent in writing are then to be lodged with the the clerk of the peace for the county, to be read at the quarter sessions next after the expiration of four weeks from the making of the certificate, and then enrolled amongst the records of the sessions.

1866

THE QUEEN v. PHILLIPS.

*Ballantine*, *Serj.*, and *Garth*, for the appellants. *Reg.* v. *Shiles* (1) is a direct authority that the sessions were right in deciding the certificate to be invalid, for not alleging the new road to be both nearer and more commodious; and although that case was much canvassed in *Wright* v. *Frant* (2), it was not overruled. It must be conceded to be at the best a very doubtful deci-

s. 88 gives an appeal to the quarter sessions to any person, "who may think himself aggrieved if any such highway should be ordered to be diverted, and turned, or stopped up, and such new highway set out in lieu thereof, or if any unnecessary highway should be ordered to be stopped up."

s. 89. "And in case of such appeal the justices at the quarter sessions shall, for the purpose of determining whether the proposed new highway is nearer or more commodious to the public, or whether the public highway so intended to be stopped up, either entirely or subject as aforesaid, is unnecessary, or whether the said party appealing would be injured or aggrieved, impannel a jury of twelve disinterested men out of the persons to serve as jurymen at such quarter sessions; and if, after hearing the evidence produced before them, the jury shall return a verdict that the proposed new highway is nearer or more commodious to the public, or that the public highway so intended to be stopped up, either entirely or subject as aforesaid, is unnecessary, or that the party appealing would not be injured or aggrieved, then the quarter sessions shall dismiss such appeal, and make the order herein mentioned (s. 91) for diverting, and turning, and stopping up such highway, either entirely or subject as aforesaid, or for diverting, turning, and stopping up of such old highway, and purchasing the ground and soil for such new highway, or for stopping up such unnecessary highway, either entirely or subject as aforesaid; but if the jury shall return a verdict that the proposed new highway is not nearer or not more commodious to the public, or that the highway so intended to be stopped up, either entirely or subject as aforesaid, is not unnecessary, or that the party appealing would be injured or aggrieved, then the quarter sessions shall allow such appeal, and shall not make such order as aforesaid."

s. 91. "If no such appeal be made, or, being made, shall be dismissed as aforesaid, then the justices at the said quarter sessions shall make an order to divert, and turn, and to stop up such highway, either entirely or subject as aforesaid, or to divert, turn, and stop up such old highway, and to purchase the ground and soil for such new highway, or to stop up such unnecessary highway, either entirely or subject as aforesaid, by such ways and means, and subject to such exceptions and conditions in all respects as in this act is mentioned in regard to highways to be widened; and the proceedings thereupon shall be binding and conclusive upon all persons whomsoever; and the new highway so to be appropriated and set out shall be and for ever continue a public highway to all intents and purposes whatsoever; but no old highway (except in the case of stopping up such useless highway, as herein is mentioned) shall be stopped up until such new highway shall be completed and put into good condition and repair, and so certified by two justices of the peace, upon view thereof." . . .

(1) 1 Q. B. 919.

(2) 4 B. & S. 118; 32 L.J. (M.C.) 204.

sion; but it is for the Court to say whether they will now overrule it. Secondly, the sessions were wrong in overruling the first and third objections. *Welch* v. *Nash* (1) was a decision under the 13 Geo. 3, c. 78, the enactments of which were similar to the present, and it is a direct authority for the appellants on both objections. Lord Ellenborough, C.J., says that the justices can only order an old highway to be stopped on condition that a new highway has been made and put in a proper state of repair; and Grose, J., talks of making a new road preparatory to stopping up the old one.

[SHEE, J. Under 5 & 6 Wm. 4, c. 50, where a road is only diverted the road is not to be actually stopped without an order of quarter sessions under s. 91, and then not till the substituted road is certified to have been made and put in a proper state of repair. The present certificate is merely preliminary, that in the opinion of the justices the diversion ought to be allowed.

BLACKBURN, J. What are the words which render it necessary that the new road should be actually made?]

Section 85 says that the certificate is to state why the old highway *is* unnecessary. Section 91 cannot alter the specific terms of s. 85.

[BLACKBURN, J. The form of notice (Sch. No. 19) does not refer to the road as made, but only to the plan of the proposed new highway.]

The last objection is fatal to the certificate. The widening of an old road is not the substitution of a new road, which is the only means by which an old road can be diverted. In *Welch* v. *Nash* (2) Lord Ellenborough, C.J., says: "The magistrates may *divert* an old road, so as to make it nearer or more commodious to the public; that is, by making a new road. The whole section contemplates that a *new* highway is to be made in lieu of the old one, which is to be stopped up; and the magistrates can only order the old highway to be stopped up on the condition that a new highway has been made and put in a proper state. But what *diverting* or *turning* of the old road has there been in this case? Or what *new* highway has been given in lieu of the old one which is stopped up? The facts are simply these: the magistrates have extin-

(1) 8 East, 394; 402. (2) 8 East, at pp. 402—3.

1866

THE QUEEN v. PHILLIPS.

guished and stopped up one old road, and have enlarged another in different parts of it; but the termini à quo and ad quem, and the direction of it, remain the same as before. Increasing the width of one old highway is neither *diverting* another old highway, nor making a new one; and the justices cannot make facts by their determination in order to give to themselves jurisdiction, contrary to the truth of the case. There is the less reason too for saying that a new highway has been set out in lieu of the old one, because Egg Lane has not been widened through its whole course, but the additions are only made in patches; so that if the old course of the highway there were stopped up, there would be no continuity of road in any other place in lieu of the other old highway which has been stopped up." Grose, J., declared himself of the same opinion, and referred to s. 16 of the act of Geo. 3 (for which s. 82 is now substituted) as pointing out the distinction between widening an old road, which is there provided for, and diverting the old and making a new road preparatory to stopping up the old one, which is provided for by s. 19 (for which s. 85 is substituted).

[BLACKBURN, J. The justices have no power to *widen* the High Street under s. 82, without the consent of the adjoining owners, for it expressly restrains the pulling down of any houses or buildings, as the respondents propose to do in the present case. (1)]

*Hawkins, Q.C., J. Brown, Q.C.*, and *L. Kelly*, for the respondents. First, the sessions were wrong in allowing the second objection. The case of *Reg. v. Shiles* (2) cannot be supported. Section 85 clearly gives the justices power to certify the diversion of an old road, supposing the vestry to have approved of the proposed alteration, if the proposed new road is nearer *or* more commodious; and s. 89 by no means supports the reasoning of the Court. It ought to be interpreted with reference to s. 85; that is, on appeal the sessions are to allow the appeal, if the jury find the road not to be nearer or not to be more commodious, according as the allegations in the certificate require either or both findings in the affirmative in order to support it. Secondly, the sessions were right in deciding against the third objection. *Welch* v. *Nash* (3),

(1) This appeared from the plan annexed to the case.
(2) 1 Q. B. 919. (3) 8 East, 394.

no doubt, is in favour of the objection; but in a later case the Court of Common Pleas overruled it, so far at least as the requiring continuity in the new road, from the terminus à quo to the terminus ad quem: for in *De Ponthieu* v. *Pennyfeather* (1) it was held that an old road might be diverted and a new road substituted by giving entirely fresh land for a part of the way, and then continuing the way over an old road; and the reasoning of Gibbs, C.J., is clearly against the decision of *Welch* v. *Nash.* (2) Moreover, in *Brittain* v. *Kinnaird* (3), Burrough, J., points out that, in *Welch* v. *Nash,* the order was clearly contrary to the provisions of the 13 Geo. 3, c. 78, "as there was no plan of the road laid out in the order, which was expressly required by the schedule in s. 16, to accompany the order." Strictly speaking, a highway cannot be diverted by the substitution of a new highway, the traffic only is diverted, so that by widening an old highway by adding fresh land to it, so as to make a narrow road commodious for traffic, you do in fact divert an old highway, and substitute a new commodious road. The first objection has been already answered; this is not the stopping up of an old highway as unnecessary, but diverting an old road and substituting another; and therefore it is not until after appeal that the order for actually stopping up the old road can be made under s. 91, and that cannot be done until the proposed new road is made and certified as fit for traffic. It would be absurd to require a new road to be made before it is ascertained whether or not the proposal will be affirmed by the quarter sessions.

[SHEE, J. *Welch* v. *Nash* (2) is no authority on this point, as that case was after the orders had been confirmed on appeal.]

BLACKBURN, J. This case is peculiar in its circumstances. The quarter sessions considered themselves bound by the authority of *Reg.* v. *Shiles* (4), which, though doubted, had not been overruled; and accordingly they held the certificate bad, on the second objection, and quashed it, subject to a case. There were two other objections made to the certificate, both of which the sessions overruled; and as to one of them, *Welch* v. *Nash* (2) seems to be directly in point against the decision of the sessions, and to shew that they

(1) 1 Marsh. 261; 5 Taunt. 634.
(2) 8 East, 394.
(3) 4 B. Moo. at p. 63; 1 B. & B. at p. 441.
(4) 1 Q. B. 919.

1866

THE QUEEN v. PHILLIPS.

ought to have quashed the certificate on this point also; and we are now called upon to support the certificate, although there are two cases directly against its validity. We certainly have come to the conclusion, perhaps presumptuously, that both cases were wrongly decided; but under ordinary circumstances we could have but one course to pursue, viz. to follow the previous decisions of this court; but, in the present case, if we decide against the validity of the certificate, in accordance with either of those cases, our decision would be final, and no further steps could be taken; whereas, if we support the certificate in spite of those cases, the question may be further litigated in an action of trespass, as is shewn by *Welch* v. *Nash* (1), or in any other form that the parties may agree to. We think, therefore, though not without great hesitation, and solely on the ground that the case can then be put in a course to have our decision reviewed in a court of error, that we ought to act on our own view of what the law is, notwithstanding the previous decisions to the contrary.

The decision in *Reg.* v. *Shiles* (2) appears to me to proceed on an erroneous construction of the Highway Act, 5 & 6 Wm. 4, c. 50, as to what is necessary when it is proposed to divert or stop up a highway. By s. 84, if the inhabitants in vestry vote that the alteration proposed is expedient, the surveyor is to apply to two justices to view it; and s. 85 points out what the justices are to do. If it shall appear to them on the view "that any highway may be diverted and turned, so as to make the same nearer *or* more commodious to the public, and the owner of the lands through which such new highway is proposed to be made shall consent thereto in writing, or it shall appear that any highway is unnecessary," then certain notices are to be given, after which the justices are to certify that they have viewed the highway, "and that the proposed new highway is nearer *or* more commodious; and if nearer, the certificate shall state the number of yards or feet nearer, or if more commodious, the reasons why it is so; and if the highway is proposed to be stopped up as unnecessary, then the certificate shall state the reason why it is unnecessary." On this section, therefore, taken alone, it would seem obvious that there are two cases contemplated,—one in which the road is to be

(1) 8 East, 394. (2) 1 Q. B. 919.

stopped up as unnecessary, the other where it is to be diverted or turned; and that when a road is proposed to be diverted or turned, when in fact there is to be a substitution of a new right of way for the old one, if the inhabitants assent to take the new highway as being nearer, though not more commodious, or as more commodious though not nearer, and the justices find the new way nearer *or* more commodious to the public, they are to certify accordingly. "Nearer *or* more commodious" is the phrase used throughout the section, and this interpretation gives to "or" its proper sense. Nevertheless, the Court of Queen's Bench, in *Reg.* v. *Shiles* (1) thought that the word "or" should be read as "and," and that the road was not to be stopped up unless the new road was found both nearer and more commodious. This decision, which certainly strains the wording of the 85th section very much, was founded on the appeal clause, s. 89 [the learned judge read the section]; and the reasoning of the Court was, that, as the clause was in the disjunctive, and if the jury found any one of the alternatives against the alteration the appeal was to be allowed, the legislature must mean that the order was not to be made unless the new road was both nearer *and* more commodious. But I think, looking at s. 89 and the preceding sections, that the whole of s. 89 has merely reference to the allegations in the justices' certificate, according as the reasons given are that the new road is nearer, or more commodious; and if the reason given is that the road is nearer, the jury are to find whether it is nearer or not: if that it is more commodious, they are to find whether it is more commodious or not; and that the appeal is to be dismissed or allowed on the finding of the jury,—secundum allegata et probata; and that s. 89, the appeal clause, ought to be interpreted with reference to s. 85, and s. 85 ought not to be forced to suit the wording of s. 89. Thus the two sections may well stand together, and the legislature be taken when they used "or" to have meant "or."

I should not have so readily arrived at this conclusion, but from the circumstance that on a former occasion this Court had to consider the decision in *Reg.* v. *Shiles* (1), and both the Chief Justice and I, in *Wright* v. *Frant* (2), expressed our dissatisfaction with it; indeed, the Chief Justice expressed himself prepared to overrule

(1) 1 Q. B. 919. (2) 4 B. & S. 118; 32 L. J. (M.C.) 204.

1866

THE QUEEN v. PHILLIPS.

it; but ultimately it became unnecessary to do so. It is now necessary to decide one way or the other; and we say we think the decision in *Reg.* v. *Shiles* (1) wrong; and inasmuch as if we hold ourselves bound by it, we should leave the parties whom we think in the right without appeal, we decide against it, though with great reluctance.

On the next point we also act on our own opinion in opposition to a decided case for the same reasons. Two things are contemplated by the statute, the completely stopping up of a road as unnecessary, and the diversion of it. In the first instance, the question is, do the inhabitants in vestry assent, are the justices satisfied that it is unnecessary, and do the jury on appeal find it unnecessary? If all these agree, the road is at once stopped up. The question here turns on the diversion of a road, the words are "diverted or turned;" but it is rather the stopping up of an old road and the substitution of a new one, by the offer of the owner to dedicate a right of way over land situate in a different direction: for there cannot be in fact a diversion or alteration of the road, that is, of the soil of the road, but only a diversion of the traffic over the substituted way. And the question is, whether there is in the present case such a diversion as is contemplated by the statute. Now, an absolutely new road is not proposed as a substitute, but it is proposed to widen an old narrow road called Bull's Alley, along which foot-passengers can now go to one of the termini of Thames Street, and which is now about eight feet wide, and land is offered which will make it on an average nearly thirty feet in breadth, and make it a commodious carriage road; and in addition to this, it is proposed to pull down buildings (2) along part of High Street, and throw the ground into the street, so as to make it of more uniform width; and on this being done, the old highway, Thames Street, is to be closed. It certainly does seem to me that this is to all intents and purposes the diversion of an old road and the substitution of a new highway; and I cannot see, in technical reasoning or common sense, any difference whether the new right of way is given over entirely new land, or whether the new land be bounded by an old narrow highway; in either case there is a substitution offered to the public for the old right of way which they

(1) 1 Q. B. 919. (2) This appeared from the plan annexed to the case.

had before. In the absence of authority, I should have thought this very clear; but in *Welch* v. *Nash* (1) Lord Ellenborough, having to interpret the meaning of the similar enactments of the old act (13 Geo. 3, c. 78, s. 19), under which the inhabitants do not intervene, but the justices have power "to divert and turn and stop up" a highway, seems to have taken a different view of it. He says: "The magistrates may *divert* an old road, so as to make it nearer or more commodious to the public, that is, by making a new road. The whole section contemplates that a *new* highway is to be made in lieu of the old one which is to be stopped up; and the magistrates can only order the old highway to be stopped on condition that a new highway has been made and put in a proper state. But what *diverting* or *turning* of the old road has there been in this case? Or what *new* highway has been given in lieu of the old one which is stopped up? The facts are simply these: the magistrates have extinguished and stopped up an old road, and have enlarged another in different parts of it; but the termini a quo and ad quem and the direction of it remain the same as before. Increasing the width of an old highway is neither *diverting* another old highway, nor making a *new* one." I quite agree that the widening of an old way is not the diverting of another; but I do not agree that giving fresh land and a right of way over it, so as to widen an old narrow road, is not the substitution of a new road within both the spirit and meaning of the enactment. Lord Ellenborough proceeds: "There is less reason, too, for saying that a new highway has been set out in lieu of the old one, because Egg Lane has not been widened through its whole course, but the additions are only made in patches; so that, if the old course of the highway there were stopped up, there would be no continuity of road in any other place in lieu of the other old highway which has been stopped up." This case was cited in *De Ponthieu* v. *Pennyfeather*. (2) There the substituted highway ran for part of the way over an old road, but the part where the land was given was entirely new; and this was held sufficient: so that the Court of Common Pleas did not necessarily differ from *Welch* v. *Nash* (3); indeed they were only asked by counsel to distinguish it; but one cannot read the judgment of

(1) 8 East, at p. 402. (2) 5 Taunt. 634; 1 Marsh. 261. (3) 8 East, 394.

1866

THE QUEEN v. PHILLIPS.

Gibbs, C.J., without seeing that he does evidently differ in his reasoning from Lord Ellenborough; and so far as the necessity of continuity in the new land is concerned the previous case *is* overruled. I think, therefore, we may take the case of *Welch* v. *Nash* (1) as much shaken, and for the reasons already given, decide this point also in favour of the respondents.

A point may also be noticed which somewhat bears on *Welch* v. *Nash*. (1) Both in the old and modern statute there is a power given as of right to justices to widen a highway which is inconvenient, paying compensation to the owners of the land taken for the purpose; but they cannot take houses or certain enclosed ground compulsorily. Now, although the owner of such property cannot be compelled to assist in what may be taken as a public benefit, the widening of Bull's Alley, if he is willing to do so on condition that Thames Street be stopped up, is there anything in the statute by which the legislature can be taken to have said, this cannot be done? I think not.

On the last point I think there can be little doubt. Where the diversion of an old road is proposed by the substitution of a new one, by s. 85 the justices are to view the place, and notices are to be given, and a plan made of the old and proposed new highway, which, together with the certificate of the justices and the consent of the owner of the land over which the new highway is proposed to be made (not made), are to be lodged with the clerk of the peace,—all treating the new highway as proposed to be made, not as already made; and then by s. 91, when there has been no appeal, or the appeal has been dismissed, at the quarter sessions next after four weeks from the lodging of the certificate, the justices are to make the order for diverting the old highway and purchasing the land for the new one; but no highway (except a highway ordered to be stopped up as useless) shall be stopped until the new highway is completed and certified to be in good condition. All this shews conclusively that the alterations are not to be made till after the quarter sessions have made the order, and that the certificate need not do more than declare that the old highway will be unnecessary when the proposed new highway is completed as proposed.

(1) 8 East, 394.

As, therefore, all the objections to the certificate, in our opinion, fail, the order of the sessions quashing the certificate must be reversed, and the certificate affirmed.

MELLOR, J. I am of the same opinion on all the points. I entirely agree with my Brother Blackburn as to the reluctance with which I venture to say that either of the decisions, which are now brought directly in question, is a decision by which we cannot abide.

With reference to *Reg.* v. *Shiles* (1), I heard part of the first argument in *Wright* v. *Frant* (2), but was obliged to leave the court before the close; and the Lord Chief Justice and my Brother Blackburn having expressed a very decided opinion, particularly the Lord Chief Justice, that *Reg.* v. *Shiles* (1) was wrongly decided, it was thought not to be right to pronounce a judicial decision against it in a court constituted only of two judges; and therefore the argument was resumed when I was able to attend, and we all, I think, agreed that the reasoning upon which that case proceeded was erroneous; but it ultimately proved unnecessary to express that opinion as the decision of the Court. That case having been shaken by the strong disapprobation expressed by my Lord Chief Justice, and the opinion expressed by my Brother Blackburn, we are now called upon to review it, and after those opinions I feel the less reluctance in saying that the reasoning upon which the case of *Reg.* v. *Shiles* (1) was founded appears to me to turn upon a misconception of the statute. It seems rather to have been brought about by a suggestion made in the course of the argument (3) by Lord Denman, that "non constat the two justices would have made the order if they had not been satisfied of both,"—that is, that the road was more commodious and nearer. I cannot help thinking, with all respect to Lord Denman, that the justices might and ought to have certified if satisfied of either. I observe at the end of the judgment Lord Denman says: "Believing, therefore, that we are more likely to effectuate what was probably the meaning by holding that all the requisites should concur before an order is made, and the latter words being as favourable to that construction as the earlier are to the opposite, we think, in answer to the first

(1) 1 Q. B. 919. (2) 4 B. & S. 118. (3) 1 Q. B. at p. 929.

1866

THE QUEEN v. PHILLIPS.

question, that one alternative having been negatived, the order should not have been made." I think that is erroneous; I think the order may be made if the substituted road is either nearer or more commodious, and that it is not necessary that both these alternatives should concur. I think we must give the same construction to the words in s. 89 which refer to the negative finding of the jury as we do to those which refer to the affirmative finding in the earlier part of the section. Therefore it is necessary, in order to avoid the certificate, that both those alternatives be found one way, that is, that the jury must negative both, because if one of them is not negatived it appears to me that so far the order remains. On this ground, with the greatest possible deference to the judges who decided that case, I think *Reg.* v. *Shiles* (1) was erroneous. This is not the result of consideration to-day for the first time, but it is fortified by the consideration which we gave on a former occasion to this matter. I think therefore, without any disrespect to those eminent judges who decided the case of *Reg.* v. *Shiles* (1), that that case was erroneously decided.

We come, secondly, to the point involved in the decision in *Welch* v. *Nash* (2), and I agree with my Brother Blackburn, in his reasons for thinking that we ought not to consider ourselves bound by that case. I cannot help thinking that the judges who threw out the suggestion that the widening clause was the clause upon which the justices ought to have proceeded, did not give sufficient attention to what the widening clause contemplates. I entirely agree in the view just now expressed, with respect to that clause, that the widening of a road is to take place quite independently of the wish of any particular person, and is to be upon the view of the public convenience, by the justices, the expense of which and the price of the land to be acquired are to be paid out of the public funds. This case proceeds upon an application by a private party who proposes to shew that what he has asked the justices to do is a reasonable thing to be done, and will be beneficial, not only to himself, but to the public. What is he to do? He is first to get the vestry to assent, and then to satisfy the justices. I cannot help thinking that the decision of the

(1) 1 Q. B. 919. (2) 8 East, 394.

Court in Lord Ellenborough's time resulted from placing too great stress on the widening clause, and too little stress on the words following: "When it shall appear upon such view of two justices that any public highway may be diverted and turned as aforesaid, so as to make the same nearer or more commodious to the public . . . . . , the justices shall proceed to certify the fact of their having viewed the highway as aforesaid, and that the proposed *new* highway is nearer or more commodious to the public." Now, I think that the mistake, as I venture to suggest, that Lord Ellenborough fell into, was in reading "new highway," as if it meant an actually different highway, something different in its position and situation, and so on. I do not think that is the real meaning of the clause. I think, when you couple it with the preceding part of the section, the meaning is, that the highway proposed to be diverted by making it nearer or by making it more commodious, when diverted is the "new" highway contemplated by this section; and under circumstances like the present, where the diversion consists in removing buildings and widening a part of an old way, still treating it as a diversion of the existing way, by taking down part of the buildings, adding to the width of the way so as to make, what was before really and practically a useless and unusable way, a road that is useful and usable,—I think that a diversion does take place by making the old way more commodious to the public. As by the course we are taking we are really putting it into the power of the appellants, if they should be dissatisfied with our judgment, and should think they can support either of these two cases, to have them reviewed in a court of error, I concur in reversing the order of sessions.

With reference to the other point, I entirely agree in the reasons assigned by my Brother Blackburn. This is not a proceeding to stop up a road as useless; if it had been, the certificate must necessarily have shewn that the highway was at present useless. But this is a proceeding to divert a highway, and the certificate, therefore, instead of certifying that the way is useless, certifies that when the proper proceedings have been taken, and all proposed alterations are made, the old road will become useless. I think it would be an extraordinary construction, and would lead to an

1866

THE QUEEN v. PHILLIPS.

absurdity, if we were to hold that a person, wishing to divert a road, must go to the expense of pulling down houses, and of widening the other road, before he can get the certificate of the justices; and may not have the same advantage by calling the attention of the justices to the circumstances as they now exist, and pointing out on the plan to their satisfaction what are the alterations which he proposes to make.

On these grounds, I am of opinion that we must come to the conclusion that the certificate of the justices was valid, and the order of sessions should be set aside.

SHEE, J., concurred.

*Order of sessions reversed.*

Attorney for appellants: *E. C. Morley.*
Attorney for respondents: *Eustace Anderson.*

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*May* 30.

THE GREAT EASTERN RAILWAY COMPANY, APPELLANTS; THE OVERSEERS OF HAUGHLEY, RESPONDENTS.

*Poor-rate—Railway—Contributive value—Allowance for Depreciation of Rolling Stock—6 & 7 Wm. 4, c. 96, s. 1.*

4 QB 356, 7 QB 138

In assessing to the poor-rate a part of a railway in a particular parish, H., the rateable value is to be ascertained by taking the gross earnings in the parish, and making the usual deductions for working expenses, &c., applicable to that part of the railway; and the fact that, owing to the increased traffic the working expenses of the railway in other parishes, over which the traffic passing through H. passes, bear a less ratio to the earnings, is not to be taken into account as lessening the average expenses over the whole transit, and so contributing to enhance the rateable value of the railway in the particular parish.

On appeal against the rating of a railway, an arbitrator (substituted for the quarter sessions) allowed for depreciation in the rolling stock an average sum calculated on the number of years the stock would last, subject to the opinion of the Queen's Bench. The railway company contended, as a matter of law, that the allowance ought to have been the difference between the value of the stock at the beginning of the year and what a new tenant would give at the end of the year.

The Court refused to interfere, holding that it was a question of fact for the sessions, in what way it might reasonably be expected that the hypothetical tenant from year to year, in considering what rent he could afford to give, would

calculate the depreciation, taking into account the surrounding circumstances, and amongst others, the probability of his tenancy continuing for more than the year.

CASE stated by an arbitrator for the opinion of the Court, on an appeal to the Suffolk quarter sessions.

1. The line of the appellants, the Great Eastern Railway Company, runs through the respondents' parish of Haughley, in the county of Suffolk, with two branches, one leading to Bury and the other to Norwich. There is a station in the parish, and there are altogether 1 mile and 69 chains of railway in the parish.

On the 4th of December, 1863, a poor-rate was duly made, in which the appellants were assessed at a rateable value of 900*l.* for their railway and station, without distinguishing them. No objection is made on the ground that the rate does not distinguish the land from the station, or on any other technical ground. The rate was duly appealed against.

2. The gross yearly earnings of the railway in Haughley are 2660*l.* The principal traffic is that passing over the railway in Haughley from Bury, in the direction towards London and back, and from Norwich in the same direction and back; and there is also considerable traffic in passing over the railway from Bury to Norwich and back. The mere local traffic, namely, that originating or ending in Haughley, is very small.

3. The following are the expenses and deductions which the arbitrator thought to be fairly applicable to that part of the railway and works which are in the parish of Haughley:

| | |
|---|---|
| Maintenance of way and works . . | 251*l.* |
| Locomotive expenses . . . | 468*l.* |
| Carriage and waggon expenses . . | 115*l.* |
| Miscellaneous expenses . . . | 478*l.* |
| Income duty . . . . . | 39*l.* |
| Tithe rent charge . . . | 5*l.* |
| Rental of stations . . . . | 106*l.* |
| Rates and taxes in the poundage on assessment . . . . . | |

The above expenses amount to 1462*l.*, with the addition of the amount for rates and taxes, which will depend upon what is determined to be the rateable value of the railway.

1866

GREAT EASTERN RAILWAY CO. v. HAUGHLEY.

4. The arbitrator also found the following deductions from the gross receipts to be properly made in ascertaining the rateable value:

| | |
|---|---|
| Fund for renewal of way . . . | 236*l.* |
| Fund for depreciation of rolling stock . | 76*l.* |
| Risks and casualties . . . . | 20*l.* |
| Interest and tenants' profits, 15 per cent. in capital employed in rolling stock and stores . . . . . | 400*l.* |

These sums added together amount to 732*l.*; and supposing the line in Haughley is properly rateable only in respect of the earnings in Haughley, the figures in this and the preceding paragraph give the rateable value of the line in Haughley about 388*l.* In that case the blank left for rates and taxes would be filled up 77*l.*

5. The arbitrator found the rateable value of the station in Haughley to be 110*l.*, so that upon the above, the whole rateable value of railway and station in Haughley would be 498*l.*

6. The above figures shew the value of the occupation of the railway derived from the actual earnings in the parish of Haughley, and that portion of the expenses and deductions fairly applicable to the portion of the line in that parish.

7. These expenses and deductions depend to some extent upon the amount of traffic or earnings, as for instance the item of miscellaneous expenses which is arrived at by dividing the whole amount of miscellaneous expenses in proportion to the earnings upon each part of the line. They also depend to some extent upon the distance run by the engines, and would be the same whether there was one carriage attached or several, and whether the carriages were empty or full.

8. The arbitrator was requested to raise for the opinion of the Court the following question, as to the occupation in Haughley being increased in value by a participation in some portion of the profits earned in other parts of the line.

9. The respondents contend that there is an additional portion of the profits beyond those actually earned in Haughley properly attributable to this occupation in Haughley, and therefore to be taken into account in ascertaining the rateable value. They contend that in respect of that portion of the traffic which passes, not

only over the line in Haughley, but also over other portions of the line, there should be a participation in all the profits earned, and therefore that, inasmuch as the same traffic is carried at a much greater profit over portions of the line where the traffic is greater than over Haughley where the traffic is small, the occupation in Haughley may be regarded as contributing to earn those additional profits.

10. The amount of contribution which the respondents insist upon is found by the mileage in Haughley, as they contend that in respect of the same traffic passing over any portion of the line, each mile over which it passes must be considered as participating in the profits earned by that traffic, or in other words, as earning a proportional part of them.

11. If the respondents are right in so contending, as in the 10th paragraph is mentioned, for the participation according to mileage of all profits in respect of the same traffic, and the fact that the whole line is worked as one concern, is sufficient to establish that proposition; then the arbitrator found, as a fact, that, independent of the profits derived from the actual earnings in Haughley, there is a further profit which, upon the aforesaid mileage principle, would, to the extent of 75*l.*, be applicable to Haughley. This further profit is arrived at by taking the earnings in respect of the same traffic in other parts of the line, deducting all the expenses taken upon the same principle as mentioned in paragraph 7, and then taking the Haughley proportion of these profits according to mileage.

12. If the respondents are not right in so contending, then the arbitrator found, as a fact, that there are no profits attributable to the occupation in Haughley beyond those derived from the actual earnings there.

The question for the opinion of the Court was, at what sum the Great Eastern Railway Company ought to be rated in Haughley.

The case having been sent back to the arbitrator to raise any questions of law that either party might think fit, the following was his additional statement:

1A. The only question of law which the arbitrator understood he was called upon to raise was the question of what was called "con-

1866

GREAT EASTERN RAILWAY CO. v. HAUGHLEY.

tributive value," that is to say, of some additional value beyond the immediate value of the occupation in Haughley. This was treated by both parties as a separate question; and the respondents, who had to establish the propriety of this addition, placed their case entirely upon the ground stated in the case, viz. that in respect of the traffic which passed over Haughley as well as other parts of the line, each mile of the railway, over which that traffic passed, must be regarded as contributing equally to the earning of the profits derived from that traffic; in other words, that if the same traffic is carried at a much greater profit over one part of the line than over another, still each part of the line must be considered as equally earning the profit.

2A. Being struck with the generality of the proposition and the apparent difficulty of sustaining it, the arbitrator took care to have it distinctly understood that this part of the claim made by the respondents was founded entirely upon the correctness of that proposition, and that if that proposition was not sustained that part of the respondents' case failed.

If that proposition be correct there can be no other question of law, the figures arrived at being merely the result of a calculation of profits.

In obedience to the rule of Court, and at the request of the parties, the arbitrator made a further addition to the case as follows:

3A. The arbitrator was requested by the appellants to state on what principle certain figures in the expenses and deductions have been arrived at.

The item for locomotive expenses in par. 3, 468*l.*, has been arrived at by taking the locomotive expenses over the whole Great Eastern system, and then giving to Haughley the same proportion as the number of miles run by trains through Haughley bear to the number of train miles run over the whole system.

The item for carriages and waggons, 115*l.*, was arrived at in a similar manner, the difference being that the number of carriages and waggons in each train must be taken in account.

4A. The item for miscellaneous expenses, 478*l.*, was agreed on both sides, and was arrived at by taking the gross amount of miscellaneous expenses applicable to the whole system, and then

taking that proportion which the gross receipts in Haughley bore to the gross receipts over the whole line. Both parties agreed that this was the proper mode of apportioning those expenses.

5A. The gross traffic in Haughley, 2660*l.* (mentioned in par. 2), is arrived at by taking that part of the receipts which arises from traffic not entirely local on the mileage principle; for example, if the whole fare of a passenger is a certain sum, then a proportional part of this sum is attributed to Haughley, according to the number of miles in Haughley.

6A. The arbitrator was also requested by the appellants to raise, as a question of law for the opinion of the Court, the proper mode of making the allowance for the depreciation of rolling stock.

The arbitrator has, in the items for locomotive expenses, and carriage and waggon expenses, made a full allowance for the annual repairs of the rolling stock, taken upon an average of several years; and as the stock would, after a certain number of years, be worn out, he has allowed the item of 76*l.* in par. 4, as the proportional part of a fund for the renewal of the stock worn out. The appellants contended that the arbitrator ought, as a matter of law, to have allowed for the depreciation of stock by taking its value at the beginning of the year, and then ascertaining what a new tenant would give for it at the end of the year, and making the difference the amount to be distributed over the line for this deduction.

The arbitrator understood the question to be brought before him as a question of fact, and as the mode of arriving at the supposed value both at the beginning and the end of the year is by estimate and valuation, and not satisfactory (the parish not having the means of testing it), he adopted the first-mentioned mode as more easily applied, as well as more correct in principle.

If the Court should be of opinion that the arbitrator ought, as a matter of law, to have adopted the mode contended for by the appellants, then this item of deduction should be increased by the sum of 56*l.*, and the rateable value diminished by a corresponding amount.

May 23. *Coleridge, Q.C.* (*Keane, Q.C.*, and *Bushby* with him), for the appellants. There are two questions: first, as to contributive

1866

GREAT EASTERN RAILWAY CO. v. HAUGHLEY.

value; secondly, the mode in which the depreciation of the rolling stock is to be calculated. On the second point the arbitrator is wrong. He has calculated the fund to be deducted for the depreciation by taking an average of several years; that is, he has taken the value of the stock at the beginning of the supposed tenancy and then calculated that the life of the stock, so to speak, would be of a certain number of years duration, and allowed the average of one year as depreciation for that year. He ought to have taken the value of the stock at the beginning of the year, and also at the end of the year, and the difference in value would be the amount to be deducted for depreciation. If the depreciation is to be calculated on the assumption of a long lease, the mode adopted may be right; but it is not applicable to a tenancy from year to year. By 6 & 7 Wm. 4, c. 96, s. 1, the rate is to be made on an estimate of the "net annual value of the hereditaments rated, that is to say, of the rent at which the same might reasonably be expected to let from year to year free of all usual tenant's rates and taxes, and deducting the probable value of the repairs, &c., necessary to maintain them in a state to command the rent." In other words the rate is to be made on the net rent that a hypothetical tenant from year to year would give for the premises, and all the deductions are to be made on the assumption of a tenancy for a year. The arbitrator therefore, had no right to assume that the tenancy would last at the most for a longer period than two years. In *Reg.* v. *North Staffordshire Railway Company* (1), this Court decided that the allowance for interest on capital, and tenant's profits, must be calculated on the actual value of the stock at the time the rate was made. Cockburn, C.J., says: "The profits must be calculated on the actual value of the stock, for it cannot be reasonable to suppose that if the company were about to give up the undertaking, they would not be willing to part with their stock at its actual value, or that if they refused to do so the incoming tenant could not procure other stock of an equally efficient character at its real value to supply the deficiency." *Reg.* v. *Great Western Railway Company* (2) is to the same effect.

[SHEE, J. The profits of the land are to be valued at what they would let for communibus annis, and no difference is to be made

(1) 30 L. J. (M.C.) 68; 3 E. & E. 392. (2) 6 Q. B. 179.

because in one particular year there was a loss: *Rex* v. *Chaplin.* (1)]

There is no objection to ascertaining the costs of the maintenance of the permanent way by taking one year with another; but the sum which the hypothetical tenant is entitled to for depreciation of rolling stock is what the stock suffers during the year to earn the yearly rent, and must be calculated on the sum which an incoming tenant would give for the stock, assuming the tenancy to determine at the end of the year.

With regard to the other point the arbitrator was right. The railway in the parish of Haughley must be rated on the amount of profits earned in that parish. The principle contended for by the respondents is not the parochial principle on which it has been decided that railways are to be rated, but is really the mileage principle, and it assumes that there may be an equal participation in unequal profits. The argument on behalf of the appellants cannot be put more forcibly than it is stated in the case by the arbitrator. The principle on which a railway is to be rated is now well settled by the decisions in *Reg.* v. *London, Brighton, and South Coast Railway Company* (2), *Reg.* v. *Great Western Railway Company* (3), *Newmarket Railway Company* v. *St. Andrews.* (4)

May 30. *Field, Q.C.* (*Guise* and *Horace Lloyd* with him), for the respondents. As to the first question: a railway no doubt is to be rated in each parish on the net profits made in that parish: *Rex* v. *Kingswinford* (5); *Rex* v. *New River Company.* (6) If both termini are in one parish there would be no difficulty. But the difficulty arises from the fact that the railway passes through many parishes, and the part in Haughley ought not to be rated as an isolated railway, but as connected with the whole line. The mode adopted is this: The fare per mile for passengers and goods is ascertained, and also the amount of traffic over the line in the parish during the year, and thus the gross receipts in the parish are arrived at; and from these are deducted all the outgoings, which gives the net profits. The expenses are of various classes, and there are different methods of ascertaining them. The method by which the

(1) 1 B. & Ad. 926.
(2) 15 Q.B. 313; 20 L.J. (M.C.) 124.
(3) 15 Q.B. 1085; 21 L.J. (M.C.) 84.
(4) 23 L.J. (M.C.) 76; 3 E. & B. 94.
(5) 7 B. & C. 236.
(6) 1 M. & S. 503.

1866

GREAT EASTERN RAILWAY CO. v. HAUGHLEY.

amount of working expenses to be deducted is ascertained is by finding the cost per train-mile on the whole railway, then the number of train-miles run on the line in the parish, and the cost per train-mile multiplied by the number of train-miles run in the parish is the amount deducted for working expenses. The other expenses are ascertained by other methods, and these deductions, together with the tenant's profits being made, the result is the rent which the supposed tenant might be reasonably expected to give, and that is said to be the rateable value. That is not the correct mode of ascertaining the rateable value; one important element is omitted. If the land in Haughley were not part of an entire system, it might be a correct mode: but, inasmuch as it is part of a system, it is of value to the tenant, not only according to the gross receipts, which are received from passengers and goods which pass over the line in the parish, but also as connected with the traffic over the whole system. The land is to be rated as land enhanced in value by having a railway placed upon it; the value of the land is not confined to the receipts in the parish, but receipts taken elsewhere, if connected with the land in the parish, are to be taken into account in ascertaining its rateable value. In *Rex* v. *New River Company* (1), the land in the parish of Amwell was of the value of 5*l.*, but it had a spring in it, which enabled the company, by means of pipes, to bring water to London, and which increased the value of the land. The land with the spring in it was therefore rated at 300*l.* *Rex* v. *Miller* (2) and *Rex* v. *Mayor of Bath* (3) are to the same effect. And so in *South Eastern Railway Company* v. *Dorking* (4), this Court held that the value of a branch line, as a feeder to the main line, was to be taken into account in ascertaining its rateable value. The principle of rating railways is well established. Every element, although without the parish, if it enhance the value of the land in the parish, is to be taken into account in estimating the rateable value of the land. Thus the mode adopted for ascertaining the expenses to be deducted is incorrect, because it assumes those expenses to be incurred in earning only the gross receipts in Haughley, whereas those expenses contribute to earn the other

(1) 1 M. & S. 503. (2) Cowp. 619. (3) 14 East, 609.
(4) 23 L. J. (M.C.) 84; 3 E. & B. 491.

receipts over other portions of the line, during the transit from one end of the railway to the other. The sum received for the transit in Haughley is some aliquot part of the whole fare, not an isolated sum for the particular mile. The appellants' railway begins at Norwich and ends in London. After passing through Haughley the train stops at Ipswich, and at that station a large accession of traffic takes place. But where many passengers are carried instead of a few, the company receive a larger proportionate profit: it is the same train, the same engine, and the expenses are nearly the same from the beginning to the end of the journey. The increase of traffic does not cause a proportionate increase of expense. It is true that the additional traffic has not passed through Haughley, and that in that sense Haughley has not contributed to earn it, but this additional traffic is carried at only a slightly increased expense, and as one expense is incurred in earning two traffics—the traffic which comes from Norwich and the traffic which joins at Ipswich—a larger profit is left on the fares of the passengers from Norwich to London.

[MELLOR, J. The parish claims to take into account the additional traffic beyond Haughley, not in the way of profits, but as diminishing the expenses in Haughley?]

Yes; admitting Haughley cannot claim to share directly in the gross receipts out of the parish, yet every passenger and every ton of goods brought on to the line after the train leaves Haughley aid to increase the net rateable value in Haughley, inasmuch as they assist in reducing the proportion of expenses to profits, and the additional traffic therefore out of Haughley ought to be considered as an element in ascertaining the rateable value of the land in Haughley.

With regard to the allowance for depreciation of rolling stock, it is a fallacy to say that the arbitrator must consider what a tenant would give for the premises for a year. The statute says the rate is to be made upon an estimate of the rent at which the premises might reasonably be expected to be let from year to year. It is not reasonable to suppose that any person would become the tenant of a railway from year to year. The principle adopted by the arbitrator is correct. There is no valid objection to calculating the amount of depreciation by taking an average of years: *Reg.* v. *Westbrook.* (1)

(1) 10 Q. B. 178.

1866

GREAT EASTERN RAILWAY CO. v. HAUGHLEY.

*Coleridge, Q.C.*, in reply. If it is now to be decided that the test of rateable value under the Parochial Assessment Act is, not what the land would let for at the beginning of each year, but what the land would let for on the assumption that the letting would go on for thirty, forty, or fifty years, that is a new mode of assessment. The words of the statute are, "The rent at which the same might reasonably be expected to let from year to year." The statute has received an interpretation in several cases. In *Reg.* v. *Westbrook* and *Reg.* v. *Everist* (1) there were actual leases for a certain number of years; the Court decided that the rent was not the criterion of rateable value, because the statute requires the rate to be made, not upon the rent that a man pays, but what the land might be reasonably expected to let for from year to year. Those were cases of rating brickfields; but no one would take a brickfield any more than a railway for a year, still the Court said, that though the existing terms of the lease may be a very good primâ facie test of rateable value, they are not the test laid down by the statute. The judgment in *Reg.* v. *North Staffordshire Railway Company* (2) also supports the appellants' contention. The rateable value of the land will be affected by the profits which the occupation of the land enables a tenant to make. Those profits will be diminished by the wear and tear of the stock and other matters which are necessary to earn the profits; that is a reduction which the tenant has a right to make before the rateable value of the land is ascertained. What is the true principle on which this reduction is to be ascertained? Why, what the value of the stock was which the tenant had upon the land to earn the profits at the beginning of the year. If that is the mode to ascertain the value of the stock against him, he has a right to take in his favour what the value of the stock would be at the end of the year, when it is possible he may have to go out; and that is the way in which the statute says it is to be ascertained.

As to the other point. All earnings and profits are to be rated in the place where they are made; and all outgoings or incomings that can be localized are to be allowed for, or rated, in that particular place. If the traffic after the train leaves the parish of Haughley, by reason of additional traffic taken up out of Haughley,

(1) 10 Q. B. 178. (2) 30 L. J. (M.C.) 68; 3 E. & E. 392.

is carried at a cheaper average rate, that is a benefit which belongs to the other parishes.

[MELLOR, J. You say each parish is entitled to the accidents which belong to it?]

Exactly. The value of the occupation in those parishes is increased by the diminution of expense, but it is not profit to which Haughley contributes, being caused by an accession of traffic out of that parish, and therefore forms no part of the rateable value in Haughley; on the contrary, it is taken into account in rating the other parishes. Besides, the deductions in this case have all been made upon the assumption that the whole railway is in the hands of one person, and the deductions have been equalized over the whole system. The parish of Haughley has had to a great extent the benefit of all these deductions. The argument of the other side, however ingenious, is the mileage principle in disguise, and that principle was scouted by the Court as long ago as 1829, in *Rex* v. *Lower Mitton* (1), the judgment in which case (without citing other authorities) anticipates and fully answers the argument for the respondents.

COCKBURN, C.J. Two questions have been presented to us in this case; the first is, whether, in assessing the railway in the parish of Haughley, the traffic beyond Haughley is to be taken into account with a view to reduce the expenditure of the line in the parish of Haughley; for of course the lower the expenditure can be reduced the larger will be the amount of profit in Haughley, and therefore the greater the rateable value of the railway in that parish. After hearing the argument, it seems to me that the decision of the learned arbitrator is right. Let us take the case presented of a through passenger from Norwich to London. It is correctly stated by Mr. Field that beyond Haughley, on the route to London, a great accession of traffic takes place, and that the carriages, which start from Norwich with a limited number of passengers, are, before they arrive at London, filled with a large accession. Mr. Field says that the effect of this additional traffic is to reduce the rate of expense with reference to each individual traveller; and that, therefore, taking the case of those indivi-

(1) 9 B. & C. at pp. 818—19.

1866

GREAT EASTERN RAILWAY CO. v. HAUGHLEY.

duals who have started from Norwich, it is not the expense of carrying those passengers through the parish of Haughley for which the estimated expenditure is to be made, but all the other passengers that join the railway and occupy carriages after the train has proceeded on must be also taken into account. It is a very ingenious mode of putting the argument; but I think there is a plain and palpable fallacy in it. It is not with reference to each individual passenger that the expense is to be ascertained, according to my view. You must ascertain the expense of the whole of the traffic between Norwich and London. Upon parts of the line the expense of conveying that traffic would be less and the profits would be greater than upon others, but the expenses upon an average are uniform throughout. I will illustrate what I mean by the case of the old stage coaches. Take the coach from Norwich to London; the expense of running it from Norwich to London was so much per mile, with little or no variation throughout the journey; so it is upon an average the same with a railway. Sometimes the coach carried five passengers and sometimes fifteen. If it carried five it probably worked at a loss, and if it carried fifteen it worked at a profit; but the expenses were the same. So it is with the railway. When they are working it from Norwich to Haughley they are probably working at a loss. When they are working beyond Haughley towards London they take up the traffic at Ipswich and other places of consequence that lie on the line, and then the traffic becomes remunerative; but the expense of working the train from one end to the other is uniformly the same. It seems to me, therefore, that there is a fallacy in the way in which Mr. Field puts his argument; and that we are not to take the additional traffic beyond Haughley into account as a matter of expense, but to take it into account as a matter of profit. Then, if it is dealt with as a matter of profit, inasmuch as it occurs beyond the parish of Haughley, it is an accident with which the parish of Haughley has no concern, but which affects the rateability of the property where the profit accrues, and not elsewhere. Therefore, treated in that short and simple way, the hypothesis, or rather the assumption, upon which Mr. Field's argument is based, namely, that you are to look at the expense of conveying each individual passenger, and not at the expense of conveying the whole traffic

as one, is not true; and considering that as a fallacious assumption, the only way of looking at the case is that which I have suggested; consequently the arbitrator was right in the conclusion at which he arrived.

The other question is, whether, in making the allowance in respect of the depreciation of the railway stock, which of course must be deducted before the profits can be got at, the learned arbitrator has been right in proceeding on the assumption, that the hypothetical tenant will make his estimate of what he can afford to pay in the way of rent upon the supposition that the stock is to be replaced and renewed at the termination of what may be called its natural life; or whether the deduction is to be taken as the difference between the value of the stock at the beginning of the hypothetical year, and the termination of it. Mr. Coleridge urged upon us very strongly that we should be departing altogether from the statute (1), and, in point of fact, making law instead of expounding it, if we said the arbitrator was right in his view, namely, that you are to make the deduction on an average over the whole of what may be called the supposed natural life of the stock. I quite agree with Mr. Coleridge, that if we were to start upon any other assumption than that we are dealing with a case of letting from year to year, we should be construing this statute in a manner in which we should not be warranted in doing. But I think it is one thing to start with the assumption that you are dealing with a tenancy from year to year, and another thing to say that the hypothetical tenant, in calculating what he can reasonably pay as rent for the premises, is necessarily to assume that his tenancy would not last beyond a year. I think the possibility of its longer duration is one of the surrounding circumstances which the tenant from year to year would take into account. It may be that the circumstances are such, that it is worth his while to deal with the stock as though he were certain that his tenancy would not be put an end to at the expiration of the year. He is to calculate for himself how much his stock will be depreciated and what it is worth his while to give, having taken that matter sufficiently into consideration. Now that seems to me to be a question of fact for

(1) 6 & 7 Wm. 4, c. 96.

1866

GREAT EASTERN RAILWAY CO. v. HAUGHLEY.

the sessions; if there were five hundred such tenants, and it was found in all instances, except a very small minority, that tenants of that class did deal with their stock in a given manner, that would be a circumstance for the sessions, or in the present case for the arbitrator, to take into account in ascertaining what a tenant from year to year would be reasonably expected to give as rent for the premises which are the subject-matter of the assessment. A tenant might make the deduction upon the one principle or he might make it upon the other; that is a question of fact to be ascertained by those who are the judges of it. I do not think there is anything in the statute that makes it necessary or incumbent upon us to say, that if the sessions or the arbitrator have found that fact in a particular way, they must necessarily be wrong. The tenant must be taken as coming in as a tenant from year to year, and then the question remains, what may he be reasonably expected to give as the annual rent of such premises? Before that fact can be arrived at a deduction must be made from his profits in respect of what he would allow for the depreciation in the stock used for the purposes for which he takes the premises, and how he would calculate this is a pure question of fact dependent on the surrounding circumstances. Being then a question of fact, we are not called upon to express an opinion; it is sufficient to say that the arbitrator has not deviated from the rule laid down in the statute in taking into account the surrounding circumstances.

MELLOR, J. I am of the same opinion on both points. The question to be answered, according to the authorities, is, what is the rateable value in each parish throughout the line of railway, which passes over a great number of parishes? That appears to me to be made up of these two elements, the actual earnings in the parish attributed to the parish, and the actual expenses attributed to the parish; and I think that it would be introducing a new difficulty into the determination of this question if we were to adopt Mr. Field's argument. Ingenious as it is, I cannot help thinking that there is a fallacy in it, it is this,—The fare of the through passenger is necessarily received at one or the other end of the journey, Norwich or London, therefore, says Mr. Field, the fare must be divided equally throughout the journey, in order to ascer-

tain the earnings in each parish on the journey; but he also says, with reference to the expenses, you must not deal with them in the same way, because the expense of carrying a passenger is diminished in certain parishes, and is greater in certain other parishes, and so the expense of conveying the passenger is not equal from one end of the journey to the other. That is true in a sense; but it is owing to the circumstance that in some parishes a large accession of traffic takes place, and the expense of carrying each passenger over those parishes would be diminished, if those parishes could be isolated for the purpose; but I think that it is an accident to be assigned to the benefit of those parishes in which the accession of traffic takes place, and not to a parish which has nothing to do with it. It seems to me, on the simple ground that the actual profit earned is much greater in some parishes than it is in others, that the rateable value in those parishes is greater than it is in others; therefore, with regard to the first point I think the arbitrator was right.

With reference to the other point, no doubt it is one of the difficulties that arise on the construction of the statute; still I do not think we are to be called upon to lay down such a rule as Mr. Coleridge contends for, because, although I agree that the calculation must be based upon what a tenant at a letting from year to year would give, yet I do not think the arbitrator is bound to say, for that purpose I shall require that a valuation of the stock shall be taken at the beginning of the hypothetical year, and another valuation at the end of it, and the deduction shall necessarily be the difference in the value. On the contrary, I think he is to look at the circumstances that would influence a person on taking the railway from year to year. In the case of a farm, he would take into consideration the mode in which the land would be cultivated in a course of years; it would be fallow one year, and would be cultivated with different crops in the ensuing year. It would be natural for the hypothetical tenant to take these circumstances into his consideration in calculating the rent he would give for the land, but he is not bound to make his calculations in any particular manner. The mere user of *new* stock would affect its selling value, but not its using value to any substantial extent. The sessions or the arbitrator, as the case may

1866

GREAT EASTERN RAILWAY CO. v. HAUGHLEY.

be, must take the circumstances into consideration as an element in arriving at what they suppose the tenant would give, but they are not bound to take any given calculation at the beginning of the year or the end of the year, as suggested on the part of the railway company. Therefore I cannot say the arbitrator is wrong as a matter of law. It is a matter for him to determine and to deal with; neither can I say that I think his mode of calculation is necessarily right. I think it is a matter of fact to be ascertained in each particular case, according to the view the sessions or the arbitrator may take of all the surrounding circumstances. On the whole, I am of opinion that our judgment must be in favour of the railway company on the first point, and in favour of the parish on the other.

SHEE, J. I am of the same opinion. The decision of the learned arbitrator in this case has been objected to both on the part of the respondents, the parish, and of the railway company, the appellants. The arbitrator has taken as the basis of his calculation the actual gross receipts of the railway in the parish of Haughley, and has arrived at their amount by ascribing to the parish of Haughley the same proportion of the gross receipts on the whole through line as the distance travelled in Haughley bears to the whole distance travelled. This amount, except on the ground of an alleged omission, is not objected to by the respondents; it is not disputed that the amount of the gross receipts in the parish of Haughley so arrived at is accurately stated to be 2660*l.*, the sum at which the arbitrator puts it. The arbitrator then proceeds to make certain deductions from that sum in respect of the expenses, and the first deduction is a number of items amounting to 1462*l.*, and then a number of other items amounting to 732*l.*; and having deducted those sums, he arrives at what he considers to be the fair rateable annual value of the railway in the parish of Haughley. The respondents attack this mode of ascertaining the rateable value by excepting to the first item of the calculation the item of gross receipts; not that they say it is a sum improperly arrived at, if no item which ought to have been admitted has been excluded by the arbitrator, but they say that it is a sum which is not properly taken as the datum of his calculation, because he has omitted from his estimate what is called "contributive value,"

that is, a value, additional to the value to be ascertained by the actual receipts in the parish of Haughley, arising, as they allege, from the circumstance that the occupation of the railway company in the parish of Haughley is more valuable on account of their occupation on other parts of their line, and particularly between Ipswich and London. The respondents say that this contributive value ought to be added to the actual value, found by the arbitrator, upon the calculation which he sets out in the case. It appears to me that that cannot be done without adopting the mileage principle instead of the parochial principle, the mileage principle never having in any of the decided cases been adopted, and the parochial principle having been always adopted in estimating the value of property in a parish for the purposes of a poor-rate. It appears from all the cases, that a railway is rateable in the parish where the particular profits are earned; it matters not where they are received. It is so laid down in several cases, and particularly in the cases of *Rex* v. *Kingswinford* (1) and *Reg.* v. *London and South Western Railway Company*. (2) So again in *Rex* v. *Lower Mitton* (3), it is laid down that if a portion of a canal in one parish is more productive than portions in other parishes, either because there is more traffic, or because the yearly outgoings and expenses there are less, it ought to be assessed at a higher proportionate value; and it is decided in *Reg.* v. *The London, Brighton and South Coast Railway Company* (4), that "the value which the land occupied in each parish produces after the due allowances, is that upon which the occupier is to be rated in each." No doubt it is very difficult in the case of railway companies, and in the case of a part only, in one parish, of a long line of railway, to apply the principle of the Parochial Assessment Act (5), that principle being that the rate on the property in a parish (and on a railway like all other property, for there is no distinction) is to be made "upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year." On both the points raised before us the

(1) 7 B. & C. 236.
(2) 1 Q. B. 558.
(3) 9 B. & C. at p. 818.
(4) 20 L. J. (M.C.) 124, 144; 15 Q.B. 313, 361.
(5) 6 & 7 Wm. 4, c. 96, s. 1.

1866

GREAT EASTERN RAILWAY CO. v. HAUGHLEY.

learned arbitrator must have found himself under the necessity of endeavouring to apply that principle in estimating the net annual value for the purpose of the calculation of the rate to be assessed upon this railway. It may be exceedingly difficult to do so. He has ascertained what the gross actual receipts were in the parish, and then, having done that, he makes certain deductions from them, and after those deductions he arrives at what is the net annual value in the parish of Haughley. It appears to me that no better mode of ascertaining that annual value has been suggested to us, and none which would not involve greater difficulty or lead to greater inconvenience, and greater probable injustice than the one which the learned arbitrator has adopted.

Secondly, it is objected on the part of the appellants, the railway company, that, supposing the parochial principle to have been correctly adopted by the learned arbitrator, and that he was right in ascertaining and making his estimate on the actual value in the parish without reference to any contributive value, he ought, in order to ascertain the net annual value in the parish, to have deducted the actual amount of the depreciation of the rolling stock upon the line during the course of the year. The principle which the learned arbitrator has adopted in making the deduction in respect of the depreciation appears to have been, not to assume that the tenancy would be one of a year only, or at most two years, but he has made his estimate upon the supposition that no one would become the tenant of the railway in the parish of Haughley for so short a time, and that the fair mode of ascertaining the annual diminution of value of the rolling stock, necessary to be kept up in order to make this portion of the line profitable, would be to ascertain what amount per annum on an average, taking the natural life, so to speak, of the rolling stock, would be sufficient to keep it up in a proper state of repair. It is not to be denied that, in estimating the amount of the deduction from the actual value of the rolling stock by wear and tear, the arbitrator has been unable to comply literally with the direction of the statute, that the rate is to be made upon the estimate of the net annual value of the property in question, that is, the rent at which the same might reasonably be expected to let from year to year. It is very difficult, I feel, to answer the argument of Mr. Coleridge, when

he pressed us with the words of the statute, and said that we were bound to give effect to its express enactment. It appears to me that they are words which, strictly speaking, are inapplicable to the particular description of property with which we are now dealing, and that therefore they must have some reasonable cy-près intendment given to them; and if we think that the arbitrator has ascertained the net annual value in a reasonable manner, and that the tenant, though he might not have a greater interest in the tenement than that of a tenant from year to year, would make his calculation on the supposition of a longer duration of tenancy, and that no one would take a railway line or part of a railway line except on a reasonable expectation that his tenancy would last for a longer time, we cannot, as it appears to me, say that the mode by which the learned arbitrator arrived at his estimate of the deductions to be made in respect of the value of the rolling stock by wear and tear is an improper one.

Upon the whole it appears to me that the arbitrator has arrived at a right conclusion upon both points which have been discussed before us.

*Rate to stand as amended by the arbitrator.*

Attorneys for appellants: *J. O. Taylor & Son, Norwich.*
Attorneys for respondents: *Field, Roscoe, & Co.*

1866
*June* 13.

KELLY *v.* SHERLOCK.

*Libel—Inadequacy of Damages.*

The plaintiff brought an action against the defendant for having published in a Liverpool newspaper, of which the defendant was proprietor, a series of libels, of a gross and offensive character, on the plaintiff as the incumbent of a church in Liverpool. It appeared at the trial that the first libel originated in the plaintiff having preached and published in the local papers two sermons, reflecting on the magistrates for having appointed a Roman Catholic chaplain to the borough gaol, and on the town council for having elected a Jew their mayor; and the plaintiff had, soon after the libels had commenced, alluded, in a letter to another newspaper, to the defendant's paper as the "dregs of provincial journalism;" and he had also delivered from the pulpit and published a statement, to the effect that some of his opponents had been guilty of subornation of perjury in relation to a charge of assault for which the plaintiff had been fined 5*s*. The jury having returned a verdict for a farthing damages, the plaintiff obtained a rule for a new trial on the ground of the inadequacy of the damages:—

*Held*, that, although on account of the grossness and repetition of the libels, the verdict, in the opinion of the Court, might well have been for larger damages, it was a question for the jury, taking the plaintiff's own conduct into consideration, what amount of damages he was entitled to; and that the Court ought not to interfere. (By Blackburn and Mellor, JJ.; Shee, J., dissenting.)

THE declaration contained ten counts for libels on the plaintiff as incumbent of St. George's Church, Liverpool, published between 21st November, 1863, and 13th August, 1864, in the *Liverpool Mail*, a weekly newspaper, of which the defendant was proprietor and editor.

The defendant pleaded not guilty; and gave notice, under 6 & 7 Vict. c. 96, of his intention to give in evidence, in mitigation of damages, that he offered an apology to the plaintiff before, and made an apology after action brought.

The cause was tried before Bramwell, B., at the summer assizes, 1865, at Manchester. The plaintiff conducted his own case: and was the only witness examined: but an immense mass of printed matter and voluminous correspondence were put in evidence.

The libel in the first count was as follows:

"Instead of at all sympathising with, we utterly loathe such rabid declamation as that of the immigrant Irish cleric, who strangely finds himself in possession of the pulpit of what was once the corporation place of worship, but bids fair to be so not

much longer, who one Sunday dares presumptuously to arraign the whole imperial legislature for laudably providing Romish chaplains for his own unhappy fellow-countrymen, the bulk of all popish prisoners in English gaols, who next Sunday presumes not only to lecture and hector all town councillors who elected a Jewish mayor (under act of parliament made many years ago), but to charge the sham existence of a moral epidemic against all the municipal voters of Liverpool, and who is next said to meditate another Irish diatribe on the religious duties of journalists. Hang the man's impudence, but Irish impudence is proverbial, so we will laugh it off with the passing observation that such ignorant and impertinent arraignments are far less suited to any English pulpit than to some such low publication as *Paddy Kelly's Budget*."

This was published in the *Liverpool Mail* of 21st November, 1863; and it appeared in evidence that it originated in the fact that the plaintiff had preached, on the 8th of November, a sermon against the appointment of a Roman Catholic chaplain to the Liverpool borough gaol, and another sermon on the succeeding Sunday reflecting in strong terms on the conduct of the town council of Liverpool in electing a Jew their mayor, and had caused extracts from both sermons to be published in the local newspapers. Some letters, relative to the plaintiff and his church, were published in succeeding numbers of the defendant's paper, with comments by the editor of a similar nature to those charged as the libel in the first count; and amongst the letters was one signed Musicus, relating to a dispute between the plaintiff and his organist, published in the number for January 30, 1864. In the *Liverpool Courier* of 5th February, 1864, the plaintiff published an answer to this letter; the conclusion of the plaintiff's answer was as follows: "This communication, I feel, had properly been addressed to the *Liverpool Mail*, which inserted, with an accompaniment of abuse emphatically its own, the anonymous effusion to which I reply. But with that paper, the dregs, I consider, of provincial journalism—of which the town of Liverpool, especially any class of religionists in it, ought to be ashamed—I desire to have nothing to do, not even in the way of contradicting its misstatements. 'Answer not a fool according to his folly, lest thou also be like unto him.'"

1866

KELLY v. SHERLOCK.

The other nine counts were articles or portions of articles in the defendant's paper, of the 6th February, 1864, and subsequent dates, couched in the coarsest and most abusive terms, relating to charges brought against the plaintiff by one of the churchwardens, as to allowing the sale of hymn-books in the church during divine service, and the use made by the plaintiff of the vestry for cooking purposes (1); and to the disagreement between the plaintiff and his organist, in which some of the parishioners took part with the organist, and which resulted in a charge of assault being brought against the plaintiff, for which the magistrates fined him 5*s.*; and in consequence the corporation withdrew the 140*l.* which they had allowed towards the services of the church.

The plaintiff drew up a statement in refutation of the charge of assault, which he read to his congregation in church, and caused to be printed and circulated. In it he stated that he had committed no assault, and that the complainant had never complained of any assault during the discussion, which lasted some days, "so that to make the allegation of assault was manifestly an afterthought, conceived between Monday and Friday, on which latter day he took out the summons, and inspired, doubtless, by the party with which he is leagued. . . . . The only resource of hope is desperate—the penitent acknowledgment of the conspirators that, stung by resentment, and thinking they were doing society a service, they swore to the *thing which is not.*"

The last libel charged having been published on the 13th August, 1864, the plaintiff's solicitor wrote, on the 18th, to the defendant demanding an ample apology. To this the defendant wrote a reply on the 25th, alluding to the plaintiff's letter to the *Liverpool Courier* of the 5th February, 1864, and to the paragraphs in the plaintiff's statement above set out, by which the defendant alleged the plaintiff intended to include the defendant as guilty of subornation of perjury (this, however, the plaintiff denied on cross-examination at the trial); and the defendant concluded by denying that anything alleged by him as a fact was untrue, but apologising for having used epithets and language towards the plaintiff which he was not justified in doing. The

(1) See *Kelly* v. *Tinling*, post, p. 699; the explanation given by the plaintiff was, of course, the same in both cases.

plaintiff's solicitor answered on the 1st September, that the apology was insufficient, as it only apologized for the manner, and persisted in the truth of the matter of the libels. The writ was issued on the 6th September. After some further correspondence, a proposed apology was submitted to the plaintiff, which was rejected by him as insufficient on the same ground as the former, but which was nevertheless published in the defendant's paper of the 5th November, 1864. It also appeared that the plaintiff had brought three other actions, against the *Liverpool Courier* (see *Kelly* v. *Tinling*, post, p. 699), against the churchwarden, and against his then attorney for negligence in conducting the case before the magistrates.

The following were the leading passages in the learned judge's summing up:

The plaintiff says that the defendant has published certain libellous matter concerning the plaintiff. The first question you have to decide is whether the publications are libels according to the law's definition of a libel. [Anything which is calculated to bring a person into ridicule, hatred, or contempt, is a libel. Although that is true as a general rule, yet it is also true—and happy for us it is that it is true—that every man has a right to discuss matters of public interest. A clergyman with his flock, an admiral with his fleet, a general with his army, and a judge with his jury—we are all of us the subjects for public discussion. So also is it matter of public interest, the dispute between the plaintiff and his organist, and the way in which the church is used—they are all public matters, and may be publicly discussed. And, provided a man, whether, in a newspaper or not, publishes a comment on a matter of public interest, fair in tone and temperate, although he may express opinions that you may not agree with, that is not a subject for an action for libel; because whoever fills a public position renders himself—again happily—open to public discussion, and if any part of his public acts is wrong, he must accept the attack as a necessary though unpleasant circumstance attaching to his position. In this country, everything, either by speech or writing, may be discussed for the benefit of the public. No doubt, therefore, the defendant was at liberty to discuss the opinions or proceedings of the plaintiff. If he has done it fairly, temperately, and calmly,

1866

KELLY v. SHERLOCK.

then he is not the fit subject for an action for libel.] (1) Let us see what the alleged libels are in this case, and upon what ground the defendant says the matters spoken of are subjects for discussion. It seems to have originated thus. The plaintiff upon two occasions, in his pulpit, denounced what I may call the law of the land on its being put into active operation. That is to say, in the pulpit he denounced those who, according to the law of the land, had appointed a Roman Catholic priest as chaplain to the prison; in the pulpit he denounced those who, according to the law of the land, had elected a Jewish mayor. . . The plaintiff, as a clergyman of the established church, may have a right to teach the doctrines which he professes as a minister, and to shew, if he pleases, that all others are wrong; but it is not his duty to say that the law of the land under which he lives is a wrong law. The plaintiff, therefore, in my mind, did what was not only a proper subject of discussion, but also a subject of reprehension; and whatever I might think of the acts of parliament, I should say the plaintiff's denunciation of them in the pulpit was wrong, and this subject may have been dealt with, and very properly, with considerable animadversion. The first alleged libel was in reference to this sermon, about the appointment of a Roman Catholic chaplain to the prison. Thereupon followed this wretched publication about the appointment of a Jewish mayor; and then came all these contemptible, ridiculous, and discreditable stories about the cooking apparatus (2), the hymn-books, the organist, the assault, and all the other trash which has been made the subject of the alleged libels on the one hand, and of petty conduct and complaint upon the other. It is true, however, that the other alleged libels came after the plaintiff's expression, "dregs of provincial journalism," and that "he would not answer a fool according to his folly."

The learned judge then expressed his unqualified opinion that the alleged libels were quite unworthy of an educated gentleman, and having gone through some of them shortly concluded thus:

I have called your attention to these, and I would ask you whether it is possible to say otherwise than that they are publications calculated to defame the plaintiff, and to expose him to con-

(1) The above passages between brackets were read by counsel on moving in *Kelly* v. *Tinling*, post, p. 699.

(2) See *Kelly* v. *Tinling*, post, p. 699.

tempt and aversion? Is it possible to say they are fair and reasonable comments upon public matters? I really do not see it for my own part; but it is a matter for your opinion. I certainly cannot see that the defendant has made out his case. Then comes the question of damages, and that is purely a matter for your consideration. It certainly is a most unfortunate thing that a gentleman who tells you that he is a minister of religion, and of love, and charity, should have managed to have embroiled himself with so many different people, and about such trash, that he should have been the plaintiff at these assizes in four actions. One would have thought that he would have made this a pilot balloon, and seen how this action went. But he has brought an action against the churchwarden of his church; he has managed to quarrel with the corporation and with the organist, and has had a scuffle with somebody else, according to the conviction for assault against him. . . If you think the defendant is guilty, then the plaintiff is entitled to something; but that something rests with you, and rests with you entirely, upon a review of all the circumstances of the case.

The jury having retired, returned into court, after an hour and a quarter, saying they could not agree; and one of them inquired what verdict would carry costs.

The learned judge replied, that it was a question which he had discussed with the late Lord Campbell, and the conclusion come to was, that the question was one which ought not to be answered by the judge. It was for the jury to say, if they found for the plaintiff, to what extent he had been damaged, irrespective of the effect the verdict might have on the question of costs. Otherwise they might actually defeat the law.

After some further discussion, a juror asked the learned judge to repeat what he had said respecting costs. On which the learned judge said:

The law supposes that you will give such damages as you think are really equivalent to the injury sustained by the plaintiff. And it says, in certain cases, for the prevention of frivolous actions, if the plaintiff does not recover a certain amount, he shall try his action at his own expense. Now it seems to me that you ought to say to yourselves, "we will give a certain amount;" but the amount

1866

KELLY v. SHERLOCK.

ought not to be regulated by its effect upon the costs. Because it is manifest, if you say we will give a certain sum in the hope it will carry costs, that you thereby defeat the object of the law. Suppose you consider that a plaintiff has been damaged to the extent of 100*l.*, you would have no right to find a verdict for 100*l.* 1*s.* for the sake of giving him costs. At the same time, let me say that I do not tell you this for the purpose of misleading you to give a particular sum.

The jury again retired, and soon afterwards returned a verdict for the plaintiff, damages one farthing.

The plaintiff having, in Michaelmas Term (Nov. 6th) (1), obtained a rule for a new trial on the ground that the damages were inadequate,

May 3. *T. Jones* shewed cause.

May 4. The plaintiff, in person, was heard in support of the rule.

*Cur. adv. vult.*

June 13. The following judgments were delivered:

SHEE, J. The plaintiff, who is a clergyman of the established church and incumbent of St. George's Church at Liverpool, brought his action to recover damages for a series of libels published in the defendant's newspaper, the *Liverpool Mail*, between the dates of the 21st November, 1863, and the 13th August, 1864, inclusively.

The defendant pleaded not guilty, and gave notice, under Lord Campbell's Act (6 & 7 Vict. c. 96), of his intention to give in evidence, in mitigation of damages, an apology which he had offered to the plaintiff.

The cause, which resulted in a verdict for the plaintiff, damages a farthing, was tried before Bramwell, B., and a special jury, at the Manchester summer assizes of last year, and we have had the advantage of being furnished with a verbatim report of the trial, and with two appendices containing the articles in full, of which parts are set out in the declaration, and with a correspondence between the attorneys of the parties, to all of which reference was made by the plaintiff and by the learned counsel for the defendant in their discussion before us of the rule.

(1) Before Cockburn, C.J., Mellor, Shee, and Lush JJ.

I agree with my learned Brothers that, regard being had to the number and character of the libels of which the plaintiff complains and to the lateness and meagreness of the defendant's apology for them, a verdict for substantial damages would have been much more satisfactory and more in accordance with the truth and justice of the case, than the verdict which has been given, and which, on the judgment of my learned Brothers, overruling my opinion, must stand.

If a peremptory rule of practice prevents us from granting a new trial, because the damages are too low, unless there has been some mistake in point of law on the part of the judge who presided, or in the calculation of figures by the jury (1), the application for a new trial in this case, which was acceded to by the full Court on neither of those grounds, ought not to have been entertained, and we ought not to have put the plaintiff to the trouble and exertion of endeavouring, as he did with great ability and perfect propriety, to support his rule. The cases referred to by my learned Brothers on the point of practice do certainly shew that the Courts are reluctant to grant new trials, in actions of tort, solely because the damages are too low; but they are not such as, in my judgment, should govern our discretion in a case like this, and are not the only cases on the point. In the first of them, *Gibbs* v. *Tunaley* (2), an action for negligence against a surgeon, the jury, having been properly told by the judge that if they thought the defendant guilty of *any* negligence the plaintiff would be entitled to nominal damages, but to serious damages if they thought the loss of the plaintiff's limb was attributable to the defendant's carelessness, adopted the former alternative, with which course the learned judge certified that he was satisfied. In *Rendall* v. *Hayward* (3), a case of verbal slander, the damages were not in amount so low as to indicate a desire to disparage the plaintiff, and would probably have been thought abundant had they been paid down before action brought, that is, had it not been for the law of costs.

This Court, on the other hand (Lord Denman at the time presiding in it, and Patteson, Williams, and Coleridge, JJ., being

(1) See per Tindal, C.J., in *Rendall* v. *Hayward*, 5 Bing. N. C. 424.

(2) 1 C. B. 640.

(3) 5 Bing. N. C. 424.

1866

KELLY v. SHERLOCK.

members of it), held,—in the case of *Armytage* v. *Haley* (1), an action to recover damages for an injury which the plaintiff had sustained through the negligent driving of the defendant's servant, although it was pressed upon them in language which the Court had recently used, that it would not take upon itself to "unravel the grounds and motives which may have led to the determination of a question once settled by the jurisdiction to which the law has referred it,"—that a farthing damages were no damages at all, and granted a new trial. If in a case of personal injury the supposed rule of practice was deemed too weak to countervail the plain justice of the case, it ought not surely to be deemed inflexible where we think that an injury to personal feelings, to honour, and character, such as entitled the plaintiff to substantial damages, has been done.

We have ourselves twice during this term, though there had been no mistake of the judge in point of law, and no miscalculation of figures by the jury, set aside verdicts and granted new trials on account of the inadequacy of the damages, because we, my Lord Chief Justice, my two learned Brothers, and myself, were of opinion that there had been no real assessment of damages, and that the machinery of justice had failed. (2)

I think it right to say that much of what fell from the learned judge in the course of the trial, and which has been made the subject of complaint to us, appears to me to have been misunderstood by the plaintiff; but I also think that instead of giving the jury so many reasons for assessing the damages at a low amount, and instead of the nice disquisition, in answer to their question, what amount would carry the costs, about the law of costs and the mischief of giving a shilling more than the exact amount of damage proved to have been sustained (there being no proof of pecuniary damage), in order to give the plaintiff costs, the learned judge would have done better to have advised them, that, regard being had to the character, the falseness, and the long continuance of the libels, and the inadequacy of the defendant's apology in respect of time and substance, with reference to the requirements of the statute under which alone it was admissible, the case was not one for nominal damages.

(1) 4 Q. B. 917. (2) See *Springett* v. *Balls*; 1 *Weekly Notes*, 191.

Upon the whole, the result of the plaintiff's appeal to the law of his country, adding as it does insult to injury, and giving a victory over him to his reviler, is, in my opinion, much to be regretted, and one which, with the utmost respect for the judgment of my learned Brothers, we might well have interfered to prevent.

MELLOR, J. In this case a rule had been obtained by the plaintiff for a new trial on the ground that the damages assessed by the jury were inadequate to compensate him for the various libels of which he complained.

I should certainly have been better satisfied with the result of the trial if the jury had assessed the damages on a higher scale, as I think that the persistence of the defendant in the reiteration of defamatory statements concerning the plaintiff, either wholly untrue or grossly exaggerated, was neither sufficiently met by his tardy and meagre apology, nor palliated by any actual provocation which he had individually received.

At the same time I cannot perceive that there was in the course of the trial any misdirection in point of law by the judge, or any mistake as to their duty on the part of the jury, or any unfair practice on the part of the defendant, which can bring this case within the exception to the general rule laid down and acted upon by the courts with regard to their interference with the assessment of damages by the jury.

In *Rendall* v. *Hayward* (1) Tindal, C.J., in refusing the rule for a new trial, is reported to have said: "I think a more complete measure of justice would have been attained if the jury had given higher damages, but the Court never grants a new trial because the damages are low, unless there has been some mistake in point of law on the part of the judge who presided, or in the calculation of figures by the jury;" and in *Gibbs* v. *Tunaley* (2) the same learned judge observes: "It is not usual with the Courts to grant a new trial on the ground that the damages are smaller than the Court may think reasonable."

If, indeed, I could see that the jury had evaded the duty of applying their minds to the consideration of the amount of

(1) 5 Bing. N.C. 424. (2) 1 C. B. at p. 641.

1866

KELLY v. SHERLOCK.

damages, we might and ought to treat it as no verdict at all, as we have done in other cases; but I am unable to perceive any such evasion of duty in the present case.

In actions of libel and slander, and in other actions of tort, not resulting in special damage which can be matter of computation, I think we should be very chary in interfering with the province of the jury, and that the least which can be required of a plaintiff who complains of the inadequacy of the damages assessed by the jury, is, that he should be able to shew that he has not afforded by his conduct any legitimate ground upon which the jury could fairly and reasonably have acted in estimating the damages to which he may be entitled at a nominal sum.

Now, in the present case it cannot be disputed that the plaintiff did, by preaching a sermon on the 8th of November, 1863, on the appointment of a Roman Catholic chaplain to the borough prison of Liverpool, and another sermon on the following Sunday on the occasion of the election of a Jew as mayor by the corporation of Liverpool, and by publishing both sermons in the newspapers, challenge the criticism of the press and the public. Upon those sermons appearing in print, the defendant, the editor of the *Liverpool Mail,* published on the 2nd of November an article in his newspaper, which comprised the libel complained of in the first count of the declaration, and which undoubtedly so far exceeded the bounds of legitimate criticism as to come within the legal definition of a libel. This article was followed by other articles not complained of in the declaration, but which led to a letter from the plaintiff, published in the *Liverpool Courier* of February 5, 1864, in which, in assigning reasons for not sending that letter for insertion to the *Liverpool Mail,* of which the defendant was the editor, he described that paper as "the dregs of provincial journalism, of which the town of Liverpool, and especially any class of religionists in it, ought to be ashamed." Other matters subsequently arose, all of which were the subject of comment and criticism in the defendant's newspaper; and other allegations of an offensive character were made with reference to the use of the church and the vestry by the plaintiff, which certainly appears to have been thoroughly explained, and to have been of a character entirely different from that represented by the

defendant. (1) Unfortunately some other disputes occurred between the plaintiff and the organist of his church which gave rise to proceedings against the plaintiff before the magistrates for assault, and the plaintiff himself took the opportunity of making observations, in his church, as well as at a meeting, regarding those proceedings, of an offensive character, which he caused to be published in the newspapers, and which the defendant alleged that he understood to impute to him the charge of "inspiring the complainant" in the proceedings against the plaintiff for the assault "to swear to the thing that is not," and also charging that "iniquity had been worked against him," by "perjury and conspiracy." These remarks the defendant alleged gave rise to the article complained of in the 9th count of the declaration: and ultimately after a correspondence with the plaintiff's attorney, in which an apology was offered, but not in terms satisfactory to the plaintiff, this action was commenced, amongst others. It is impossible to deny that these various matters being in evidence before the jury might reasonably affect the measure of damages.

It is not enough to justify us in setting aside the verdict that we believe that the jury did not form the same estimate that we might have done of the fact that the libels extended over a long period of time and reiterated imputations which had been satisfactorily explained. It may suffice to say, that, as to the amount of damages, it was the province of the jury to weigh both the matters of aggravation and mitigation, and to determine the result.

I am, therefore, of opinion that we cannot, without departing from a well-established practice, grant a new trial in the present case. This rule, therefore, will be discharged.

BLACKBURN, J. In this case I have come to the same conclusion as my Brother Mellor.

I do not think that there is any inexorable rule of practice by which we are precluded from ever granting a new trial on account of the smallness of damages. In several cases alluded to by my Brother Shee, where the smallness of the damages shewed that the jury had made a compromise, and instead of deciding the issue submitted to them of guilty or not guilty, had agreed to

(1) *Kelly* v. *Tinling*, post, p. 699.

1866

KELLY v. SHERLOCK.

find for the plaintiff without damages, the Court granted a new trial; but there the case is much as if the jury had held out and had been discharged without a verdict. But in the present case there could be no doubt that the publications were libels, and libels of a gross and offensive character, and if the question had been one of punishing the defendant, no one could have doubted that the verdict ought to have been heavy. But the question was not what fine ought to be imposed on the defendant, but what compensation ought the plaintiff to have for his injured feelings for it is to be observed that there was no actual pecuniary damage; and that no one, who in these unhappy controversies was not already prejudiced against the plaintiff, would think worse of him in consequence of the vulgar abuse of the defendant.

Now, there can be no set-off of one libel or misconduct against another; but in estimating the compensation for the plaintiff's injured feelings, the jury might fairly consider the plaintiff's conduct and the degree of respect which the plaintiff himself had shewn for the feelings of others; and finding on the evidence, that he published in the local press sermons reflecting on the local authorities, that he published a statement (which I own I think borne out by the articles) that the defendant's paper was so conducted as to justify the epithet of "the dregs of provincial journalism;" and, above all, that he delivered from the pulpit, and published in the provincial papers, a statement to the effect that some of his opponents (no matter, in my opinion, whether including the defendant or not) had been guilty of subornation of perjury, and would, as he charitably hoped, repent on their deathbeds and confess their guilt, I cannot say that I think the jury were bound to give him substantial damages, though I heartily wish that their verdict had not been such as to give an appearance of triumph to the defendant.

The rule must, in conformity with the opinion of the majority, be discharged.

*Rule discharged.*

Attorneys for defendant: *Sole, Turner, & Turner.*

## KELLY *v.* TINLING.

1865*
*Nov.* 6.

*Libel—Matter of Public Interest—Dispute between Incumbent and Churchwarden as to use of Church.*

A churchwarden having written to the plaintiff, the incumbent, accusing him of having desecrated the church, by allowing books to be sold in it during service, and by turning the vestry-room into a cooking apartment, the correspondence was published without the plaintiff's permission in the defendant's newspaper, with comments on the plaintiff's conduct :—

*Held*, that this was a matter of public interest, which might be made the subject of public discussion; and that the publication was, therefore, not libellous, unless the language used was stronger than, in the opinion of the jury, the occasion justified.

DECLARATION containing several counts for libel.

Plea, not guilty.

At the trial before Bramwell, B., at the Manchester summer assizes, 1865, it appeared that the alleged libels were contained in various numbers of the *Liverpool Daily Courier*, of which the defendant was proprietor. The libel in the first count consisted of a correspondence which had taken place between the plaintiff, who was incumbent of St. George's Church, Liverpool, and one of the churchwardens, the correspondence having been published in the defendant's paper without the plaintiff's permission or knowledge. In the letters of the churchwarden were the following passages: "I have observed with pain the church turned into a bookseller's shop during divine service by your errand boy selling books under the pulpit, and money being jingled about in giving change, to the annoyance of many of the congregation. Nor can I omit to allude to the desecration of the church by turning a portion of it into a cooking apartment, and endangering the sacred edifice, which I am bound to protect." . . . . "As you make use of St. George's Church for a number of purposes for which it was never intended, it becomes my painful duty to request that these improprieties may cease. In order to protect the edifice from fire, the gas pipes connected with the cooking apparatus must be removed immediately; the dining tables should also be taken

* The report of this case has been deferred in order that it might be published with the preceding case of *Kelly* v. *Sherlock*.

1865

KELLY v. TINLING.

away." The other libels consisted of letters of correspondents, with editorial remarks, commenting in very strong language on the conduct of the plaintiff.

The plaintiff explained that the charge of selling books originated in his servant distributing and receiving money for hymn-books; and the receipt of money in the church was at once stopped by the plaintiff when he was apprised of it; and as to the cooking apartment and apparatus, that he had simply had a potato cooked in the vestry-room, when compelled from pressure of time to have refreshment there between the services.

This cause was tried the next day after that of *Kelly* v. *Sherlock* (1), and in summing up the learned judge observed that the jury had been present in court and had heard his observations addressed to the jury in the previous trial; and said, "You will have to consider, first, whether the publication is defamatory; if it is, you will then consider whether it is within those reasonable limits of discussion which I have endeavoured to explain on a former occasion." And after reading the libels, "If you think all or any of these publications defamatory, and not justified by the liberty of criticism accorded to the press, then you will give your verdict for the plaintiff in respect of such part as is defamatory; but if you think none of them defamatory, or if defamatory justifiable, then you will give your verdict for the defendant."

The jury returned a verdict for the defendant.

*Macnamara* moved for a rule for a new trial, for misdirection, on the ground that the publication was not in a matter of public interest; and for that the verdict was against evidence.

The learned judge's direction must be taken to have embodied such parts of his summing up in *Kelly* v. *Sherlock* as were applicable to the present case (2), and he misdirected the jury in telling them that a correspondence between a clergyman and his churchwarden as to the way in which the church was used was matter of public interest so as to be a matter for public comment. In *Gathercole* v. *Miall* (3), it was doubted whether a sermon

(1) See ante, p. 686.

(2) The learned counsel, in addition to the passages given above, read the paragraphs, from the summing up in *Kelly* v. *Sherlock*, printed within brackets, ante, pp. 689—690.

(3) 15 M. & W. 319.

preached but not published was matter for public comment; and it was held that the management of a charity in the plaintiff's parish, to the exclusion of dissenters, was not a matter of public interest so as to be open to what has been called "licentious" comment, as opposed to a comment that must be based in truth. (1)

[MELLOR, J. *Campbell* v. *Spottiswoode* (2) is more in point, and shews that it is the excess of comment only that makes the publication of such a matter libellous.]

That case is in point for the plaintiff, as demonstrating most distinctly that a journalist has no other or greater right than a private individual in commenting on the acts of another, even although matter of public interest; and the comments in the present case went far beyond what the occasion justified.

COCKBURN, C.J. I am of opinion that there should be no rule. I cannot think that a dispute between a clergyman and his churchwarden, as to what he allows to be done in his church during divine service, and the uses to which he puts part of it, namely, the vestry-room, which were the matters involved in the correspondence between them, is not a subject of public interest. The maintenance of decency and propriety in conducting public worship and of the sanctity of the sacred edifice and all connected with it is surely a matter of the greatest public concern. The very use of the term "public worship" shews this. Every word of the summing up of the learned judge, which has been read, seems to me to have been said with the most perfect propriety. The only question, therefore, is, whether there was any excess in the comments; that was matter entirely for the jury, and although some of the expressions used in the letters might have been thought stronger than the limits of fair criticism and comment would allow, yet as the jury have found them only a fair comment, I do not think we are called upon to interfere.

MELLOR, J. I am of the same opinion. I do not yield to the suggestion of the editor of the defendant's newspaper in answer to the plaintiff's complaint of the publication of the correspondence, that it is of advantage to a person to have libellous charges pub-

(1) See Pollock, C.B., 15 M. & W. at p. 334.

(2) 32 L. J. (Q. B.) 185; 3 B. & S. 769.

1865

KELLY v. TINLING.

lished, as it gives him an opportunity of contradicting or explaining them; but although the language used in some parts of the publication is stronger than I might have thought justifiable, yet we ought not to disturb the verdict unless we can see that it is clearly wrong.

SHEE and LUSH, JJ., concurred.

*Rule refused.*

Attorney for plaintiff: *Southee.*

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1866

*June 14.*

## THE QUEEN *v.* STEPHENS.

*Nuisance—Master and Servant—Master liable on Indictment for act of Servant.*

The owner of works, carried on for his profit by his agents, is liable to be indicted for a public nuisance caused by acts of his workmen in carrying on the works, though done by them without his knowledge and contrary to his general orders.

INDICTMENT. First count for obstructing the navigation of a public river called the Tivy by casting and throwing, and causing to be cast and thrown, slate stone and rubbish in and upon the soil and bed of the river, and thereby raising and producing great mounds projecting and extending along the stream and waterway of the river.

Second count that the defendant was the owner of large quantities of slate quarried from certain slate quarries near the river Tivy, and that he unlawfully kept, permitted, and suffered to be and remain large quantities of slate sunk in the river, so that the navigation of the river was obstructed.

Plea, not guilty.

The indictment was tried before Blackburn, J., at the last spring assizes for Pembrokeshire, when the following facts were proved:—The Tivy is a public navigable river which flows through Llechryd Bridge, thence by Kilgerran Castle, and from thence past the town of Cardigan to the sea. About twenty years ago the Tivy was navigable to within a quarter of a mile of Llechryd Bridge, from which place a considerable traffic was carried on in limestone and culm by means of lighters.

1866

THE QUEEN v. STEPHENS.

The defendant is the owner of a slate quarry called the Castle Quarry, situate near the Castle of Kilgerran, which he has extensively worked since 1842. The defendant had no spoil bank at the quarry. The rubbish from the quarry was stacked about five or six yards from the edge of the river. Previous to 1847, the defendant erected a wall to prevent it from falling into the river, but in that year a heavy flood carried away the wall, and with it large quantities of the rubbish. Quantities of additional rubbish were from time to time shot by the defendant's workmen on the same spot, and so slid into the river. By these means the navigation was obstructed, so that even small boats were prevented from coming up to Llechryd Bridge.

The defendant being upwards of eighty years of age was unable personally to superintend the working of the quarry, which was managed for his benefit by his sons. The defendant's counsel was prepared to offer evidence that the workmen at the quarry had been prohibited both by the defendant and his sons from thus depositing the rubbish; and that they had been told to place the rubbish in the old excavations and in a place provided for that purpose. The learned judge intimated that the evidence was immaterial; and he directed the jury that as the defendant was the proprietor of the quarry, the quarrying of which was carried on for his benefit, it was his duty to take all proper precautions to prevent the rubbish from falling into the river, and that if a substantial part of the rubbish went into the river from having been improperly stacked so near the river as to fall into it, the defendant was guilty of having caused a nuisance, although the acts might have been committed by his workmen, without his knowledge and against his general orders. The jury found a verdict of guilty.

A rule having been obtained for a new trial, on the ground that the judge misdirected the jury in telling them that the defendant would be liable for the acts of his workmen in depositing the rubbish from the quarries so as to become a nuisance, though without the defendant's knowledge and against his orders,

*H. S. Giffard, Q.C.*, and *Poland*, shewed cause. It must be conceded on behalf of the defendant that if an action had been brought

1866

THE QUEEN v. STEPHENS.

against him for a nuisance, he would be liable for the negligence of his workmen; but it will be contended that though the defendant may be answerable civilly, he is not criminally responsible for the acts of his servants. No doubt when a criminal offence is charged there must be mens rea: but it is manifest that there are a large class of cases in which it is unnecessary to prove a criminal intention; for instance, in an indictment for obstructing a highway, although the obstruction may have been caused bonâ fide and under a belief of a right, still the defendant would be liable for the obstruction; so in like manner in an indictment against a person for the non-repair of a highway which he is bound to repair ratione tenuræ, it would be no answer for him to say that he did not know the highway was out of repair. Evidence which is sufficient to render a man liable in an action for a nuisance is sufficient to make him liable on an indictment; otherwise no indictment could be preferred against a corporation for misfeasance. It is not every member of the public that can bring an action for a public nuisance. Common nuisances, which annoy the whole community are not actionable but indictable: for it would be unreasonable to multiply suits by giving every man a separate right of action for what damnifies him in common only with the rest of his fellow subjects: 4 Bl. Com. 166. For this reason no person, natural or corporate, can have an action for a public nuisance or punish it, but only the king in his public capacity of supreme governor and pater familias of the kingdom: 3 Bl. Com. 220. It would, therefore, be most unreasonable to hold that evidence sufficient to make the defendant liable in an action is not sufficient to make him liable on an indictment, the more so as the object of the indictment is not to punish the wrongdoer but to abate the nuisance, and the law requires that where a public right has been invaded it should be vindicated by a form of procedure of a public nature such as an indictment. In *Rex* v. *Medley* (1) the directors of a gas company, together with the superintendent and engineer, were indicted for a nuisance in permitting the refuse of gas to be conveyed into a public river. It was proved that the directors left the management of the works to the superintendent, who directed the engineer, and he gave orders to the rest of the workmen. Lord

(1) 6 C. & P. 292.

Denman thus directed the jury: "It is said that the directors were ignorant of what had been done. In my judgment that makes no difference; provided you think that they gave authority to Leadbeter (the superintendent) to conduct the works, they will be answerable. It seems to me both common sense and law that if persons for their own advantage employ servants to conduct works, they must be answerable for what is done by those servants." That ruling has never been questioned. In Noy's Maxims, c. 44, it is laid down: "We shall be charged if any of our family lay or cast anything in the highway to the nuisance of his majesty's liege people." This maxim is cited by Eyre, C.J., in *Bush* v. *Steinman* (1), and he puts the case of an owner of a house, who, with a view to rebuild or repair, employs his own servants to erect a hoard in the street (which being for the benefit of the public they may lawfully do), and they carry it out so far as to encroach unreasonably on the highway, he adds: "It is clear the owner would be guilty of a nuisance." So in *Turberville* v. *Stampe* (2), the defendant was held liable for damages done by fire he had lighted in his field. Holt, C.J., said: "If a stranger set fire to my house, and it burns my neighbour's house, no action will lie against me; but if my servant throws dirt into the highway I am indictable." In *Laugher* v. *Pointer* (3), Lord Tenterden, in his judgment, observes: "Whatever is done for the working of my mine, or the repair of my house, by persons mediately or immediately employed by me, may be considered as done by me. I have the control or management of all that belongs to my land or my house; and it is my fault if I do not so exercise my authority as to prevent injury to another." So here the defendant was bound so to work his mine as not to be a nuisance to the public, and whatever was done by his workmen for his benefit must be intended to have been done with his authority: *Rex* v. *Dixon*. (4) It is said a corporation cannot be guilty of treason or felony, because to commit such offences there must be mala mens, but there is a great difference between those offences and the present.

[SHEE, J. *Rex* v. *Pedley* (5), shews that if a man let land with a nuisance on it he is responsible for the acts of his tenant; and in

(1) 1 B. & P. at p. 407. (2) 1 Ld. Raym. 264. (3) 5 B. & C. at p. 576.
(4) 3 M. & S. 11. (5) 1 A. & E. 822.

1866

THE QUEEN v. STEPHENS.

*Rex* v. *Moore* (1), Littledale, J., says that although it may not be the defendant's object to create a nuisance, yet if it be the probable consequence of his act he is answerable as if it were his actual object.

BLACKBURN, J. It appears to be assumed in *Rex* v. *Pedley* (2), that there is no distinction as to the evidence necessary to render a person liable for a nuisance in an action and in an indictment.]

There is no reason why there should be any distinction; the only reason why an indictment is preferred is because the nuisance is common to the whole community, and an action will not lie. In Smith on Master and Servant, p. 181, it is laid down: "Again, masters are liable to indictments for public nuisances, such as carrying on offensive trades, committed by their servants, although their masters have nothing to do personally with the nuisance complained of." All the authorities are there collected, and amongst others *Reedie* v. *London and North Western Railway Co.* (3) and *Reg.* v. *Great North of England Railway Co.* (4) In the latter case, it was held that an indictment lies against a corporation for a misfeasance; that is a very strong authority against the defendant. In *Reg.* v. *Birmingham and Gloucester Railway Co.* (5), it was held that an indictment would lie against a corporation for nonfeasance; but if it be shewn that an indictment lies against a corporation for misfeasance, it is a conclusive authority to shew that it is unnecessary to prove a guilty intention, and that there has been no misdirection. The defendant is bound to keep the rubbish from the quarry on his own land: *Tenant* v. *Goldwin* (6); and he is answerable if it is allowed to escape either by the act of his servant, or from any other cause, so as to do an injury or become a nuisance, either to his neighbour or to the public: *Rex* v. *Dixon.* (7)

[MELLOR, J., referred to *Fletcher* v. *Rylands.* (8)]

*J. W. Bowen* and *Hughes* in support of the rule. Substantially the offence with which the defendant is charged is a criminal act, and he is not responsible criminally for the conduct of his servant.

(1) 3 B. & Ad. at p. 188.
(2) 1 A. & E. 822.
(3) 4 Ex. 244.
(4) 9 Q. B. 315.
(5) 3 Q. B. 223.
(6) 1 Salk. 360.
(7) 3 M. & S. 11.
(8) Law Rep. 1 Ex. 265.

*Rex* v. *Medley* (1) is distinguishable. In the present case competent workmen were employed, and specific instructions were given to them which were not obeyed, so that the acts complained of were done, not only without his knowledge, but against the defendant's orders. Moreover, in Taylor on Evidence, vol. i. p. 124, it is said of *Rex* v. *Medley* (1), that it carries the doctrine of the principal's liability to its furthest extent. There is no authority directly in point. In *Reg.* v. *Russell* (2) Lord Campbell, C.J., was of opinion that an indictment for obstructing a navigation by erecting a wall was a criminal proceeding, and altogether different from that of an indictment for nonrepair of a highroad, which was in the nature of a proceeding for enforcing a civil right.

[BLACKBURN, J. The other members of the Court were not of that opinion.]

No doubt. But as pointed out by Lord Campbell, C.J., the fine in the one case is usually nominal, and in the other case a substantial punishment might be inflicted. There is also a distinction between an indictment for nonfeasance and for misfeasance. In the latter case, the person who does the act or orders it to be done, is alone indictable. Assume that an indictment would lie against a corporation for misfeasance, they would not be liable for any act of their surveyor which they had never authorized. That the principal is answerable for his deputy civilly, but not criminally, is a well established rule of law; it is the person who immediately does the act or permits it to be done, who is criminally punishable: *Rex* v. *Huggins* (3); *Attorney General* v. *Siddon.* (4) The sending by railway of vitriol, or other goods of a dangerous character, is made a criminal offence by 5 & 6 Wm. 4, c. cvii., but to render the sender liable it is necessary to prove a guilty knowledge: *Hearne* v. *Garton.* (5) So here, the prosecution ought to shew that the defendant knew that rubbish was put into the river, and that it was a nuisance. In *Reg.* v. *Great North of England Railway Co.* (6), a carriage road had been cut through by a railway, and it must be assumed that the act was done by the direction of the di-

(1) 6 C. & P. 292.
(2) 3 E. & B. 942; 23 L. J. (M. C.) 173.
(3) 2 Ld. Raym. 1574; 1580.
(4) 1 C. & J. 220.
(5) 28 L. J. (M. C.) 216; 2 E. & E. 66.
(6) 9 Q. B. 315.

1866

THE QUEEN v. STEPHENS.

rectors; it is no authority for saying that the company are responsible criminally for acts of their servants, which they had never authorized. That case no doubt decided that a corporation might be indicted for a misfeasance; and it has been held that trespass lies against a corporation for an assault: *Eastern Counties Railway Company* v. *Broom* (1); and an action is maintainable against a corporation for a libel: *Whitfield* v. *South Eastern Railway Company* (2); but it is still unsettled whether an action for malicious prosecution will lie: *Stevens* v. *Midland Counties Railway Company.* (3) In informations for libel in newspapers, it has been held that the proprietor, though he takes no part in the conduct of the paper, is criminally responsible: *Rex* v. *Gutch* (4); *Rex* v. *Almon.* (5) But evidence that the libel was published without the defendant's authority is admissible to rebut the primâ facie case.

[BLACKBURN, J. That can only be done under section 7 of the 6 & 7 Vict. c. 96.]

A distinction also may be drawn between this case and those in which the nuisance complained of is necessarily incident to the works carried on; in such cases an authority might perhaps be presumed, but in the present case, as the nuisance was committed by the defendant's workmen against his express orders, he is not liable criminally for their acts.

MELLOR, J. In this case I am of opinion, and in my opinion my Brother Shee concurs (6), that the direction of my Brother Blackburn was right. It is quite true that this in point of form is a proceeding of a criminal nature, but in substance I think it is in the nature of a civil proceeding, and I can see no reason why a different rule should prevail with regard to such an act as is charged in this indictment between proceedings which are civil and proceedings which are criminal. I think there may be nuisances of such a character that the rule I am applying here, would not be applicable to them, but here it is perfectly clear that the only reason for proceeding criminally is that the nuisance, instead of being

(1) 6 Ex. 314; 20 L. J. (Ex.) 196.
(2) 27 L. J. (Q.B.) 229; E. B. & E. 115.
(3) 10 Ex. 352; 23 L. J. (Ex.) 328.
(4) Mood. & M. 433.
(5) 5 Burr. 2686.
(6) Shee, J., left the court just before the conclusion of the argument.

merely a nuisance affecting an individual, or one or two individuals, affects the public at large, and no private individual, without receiving some special injury, could have maintained an action. Then if the contention of those who say the direction is wrong is to prevail, the public would have great difficulty in getting redress The object of this indictment is to prevent the recurrence of the nuisance. The prosecutor cannot proceed by action, but must proceed by indictment, and if this were strictly a criminal proceeding the prosecution would be met with the objection that there was no mens rea: that the indictment charged the defendant with a criminal offence, when in reality there was no proof that the defendant knew of the act, or that he himself gave orders to his servants to do the particular act he is charged with; still at the same time it is perfectly clear that the defendant finds the capital, and carries on the business which causes the nuisance, and it is carried on for his benefit; although from age or infirmity the defendant is unable to go to the premises, the business is carried on for him by his sons, or at all events by his agents. Under these circumstances the defendant must necessarily give to his servants or agents all the authority that is incident to the carrying on of the business. It is not because he had at some time or other given directions that it should be carried on so as not to allow the refuse from the works to fall into the river, and desired his servants to provide some other place for depositing it, that when it has fallen into the river, and has become prejudicial to the public, he can say he is not liable on an indictment for a nuisance caused by the acts of his servants. It appears to me that all it was necessary to prove is, that the nuisance was caused in the carrying on of the works of the quarry. That being so my Brother Blackburn's direction to the jury was quite right.

I agree that the authorities that bear directly upon the case are very few. In the case of *Reg.* v. *Russell* (1), the observations of Lord Campbell might have been justified by the circumstances of that case, though as I understand it the judgment of the other judges did not proceed on the same reasons. It is therefore only the opinion of Lord Campbell as applied to that case. Whether there is or is not any distinction between that case and

(1) 3 E. & B. 942; 23 L. J. (M. C.) 173.

1866

THE QUEEN v. STEPHENS.

the present may be open to question; but if there is no distinction, I should be prepared rather to have acted upon the reasons which influenced the other judges than those which influenced Lord Campbell. Inasmuch as the object of the indictment is not to punish the defendant, but really to prevent the nuisance from being continued, I think that the evidence which would support a civil action would be sufficient to support an indictment.

The rule must be discharged. As I have said, my Brother Shee concurs with me in that opinion.

BLACKBURN, J. I need only add that I see no reason to change the opinion I formed at the trial. I only wish to guard myself against it being supposed that either at the trial or now, the general rule that a principal is not criminally answerable for the act of his agent is infringed. All that it is necessary to say is this, that where a person maintains works by his capital, and employs servants, and so carries on the works as in fact to cause a nuisance to a private right, for which an action would lie, if the same nuisance inflicts an injury upon a public right the remedy for which would be by indictment, the evidence which would maintain the action would also support the indictment. That is all that it was necessary to decide and all that is decided.

*Rule discharged.*

Attorneys for prosecution: *Poole & Hughes.*
Attorney for defendant: *C. E. Abbott.*

[IN THE EXCHEQUER CHAMBER.]

COE *v.* WISE.

1866
*June* 14.

*Action—Liability of Commissioners for a public purpose—Master and Servant—Compensation or Action—Jurisdiction of Superior Courts, where ousted.*

By an act of parliament, drainage commissioners were to make and maintain a cut and sluice; the sluice burst, owing to the negligence of the servants of the commissioners, and damage having ensued to the plaintiff's land, he brought an action against the commissioners, in the name of their clerk:—

*Held* (overruling the judgment of the Queen's Bench), on the authority of the *Mersey Docks* cases (1), that the commissioners were not exempt from liability by reason of their being commissioners for a public purpose; and that the duty being imposed upon them of maintaining the sluice, they were liable for the damage caused by the negligent performance of that duty by their servants.

By a section of the statute, if any person, after the commissioners or any person employed or authorized by them shall have begun to carry the statute into execution, shall sustain damage or injury in his lands or chattels by or in consequence of any act of the commissioners, their agents, workmen, or servants, the damage or injury shall be ascertained by a jury before the sheriff:—

*Held*, that the section applied only to damage resulting from acts authorized by the statute; but, assuming it to extend to unauthorized acts, on a review of the statute, and inasmuch as the cause of action was for an omission or nonfeasance, it was not the subject of compensation within the section.

*Quære*, whether the section would exclude the jurisdiction of the superior courts in cases to which it applies: *Semble*, that it would.

2 QB 265.

3 Ex 117

4 CP 280

2 QBD 14

Appeal from the decision of the Court of Queen's Bench, making absolute a rule to enter the verdict for the defendant. (2)

The action was brought against the defendant as clerk to the drainage commissioners for carrying into execution the 7 & 8 Vict. c. cvi., an act for improving the drainage and navigation of the Middle Level of the Fens.

The declaration complained of damage caused to the plaintiff's land by the negligence of the commissioners in the making and maintaining a cut and sluice which they were bound to make and maintain under ss. 137 and 138 of the above act.

Plea, that the commissioners were not guilty.

The cause was tried before Erle, C.J., at the Norfolk spring

(1) *Mersey Docks Trustees* v. *Gibbs*; *Same* v. *Penhallow*: Law Rep. 1 H. L. 93.

(2) See 5 B. & S. 440; 33 L. J. (Q.B.) 281.

1866

COE v. WISE.

assizes, 1863, and the evidence shewed negligence on the part of the resident engineer and sluice-keeper employed by the commissioners, in consequence of which the sluice gave way, whereby the lands of the plaintiff and others were flooded.

The Chief Justice left four questions to the jury: Was damage caused to the plaintiff's land by the absence of due care and skill on the part of the commissioners, first, in respect of the making of the sluice? secondly, in respect of the maintaining of the sluice? thirdly, in respect of providing remedies against mischief after the sluice was destroyed? and fourthly, was damage caused to the plaintiff by reason that no puddle clay wall was made along each of the banks of the cut? (1)

The jury answered the first question in the negative in favour of the defendant, and the other three questions in the affirmative in favour of the plaintiff.

The verdict was accordingly entered for the plaintiff, leave being reserved to move to enter it for the defendant.

A rule was obtained, pursuant to the leave reserved, to enter a verdict for the defendant, on the ground that the action was not maintainable, because the drainage commissioners, being a public body and bound to discharge public duties without reward, and the acts of parliament providing no funds to meet such a demand as was made in this action, are not responsible for the negligence of engineers, contractors, officers, or servants whom they may employ.

This rule was afterwards, May 24, 1864, made absolute: Cockburn, C.J., and Mellor, J., being of opinion that the commissioners were not liable: inasmuch as they were persons intrusted with a public duty and discharged it gratuitously, and had themselves been guilty of no negligence, and had no funds out of which the damages could be paid. Blackburn, J., was of opinion, that, as there was an absolute duty imposed on the commissioners of maintaining the cut and sluice, they were liable for the damage caused by the negligent performance of that duty by their servants. (2)

The argument of the appeal stood over for the decision of the

(1) This had reference to a clause in s. 137.

(2) See 5 B. & S. 440; 33 L. J. (Q.B.) 281.

*Mersey Docks* cases in the House of Lords; and judgment having been given in those cases for the plaintiffs (1), to the effect that public commissioners were liable for negligence of their servants in the same way as a private company, the appeal came on for argument. (2)

(1) *Mersey Docks Trustees* v. *Gibbs*; *Same* v. *Penhallow*: Law Rep. 1 H. L. 93.

(2) In addition to the short notice of the different sections of the 7 & 8 Vict. c. cvi. in the argument and judgments, it is necessary to give the following sections more at length:

s. 20. "In all actions and suits, in respect of any matter or thing relating to the execution of this act, to be brought by or against the commissioners, it shall be sufficient to state the names of any two of the commissioners, or the name of their clerk, as the party, plaintiff or defendant, representing the commissioners in such action or suit; and no such action shall abate or be discontinued by the death of any such commissioner, or by the death, suspension, or removal of such clerk."

s. 21. "Executions upon every judgment or decree against the commissioners in such action or suit shall be executed against the goods and chattels belonging to the commissioners by virtue of their office."

s. 22 protects the two commissioners or clerk from personal liability for costs, &c.

s. 36 enables the commissioners to borrow, from time to time, to a limited amount, on mortgage of the rates, taxes, and tolls authorized by the act, or other funds and property of the commissioners, any sums of money which they may think necessary "for the purposes of the act."

s. 49 enables the commissioners to raise a temporary loan for the purposes of the act, on the tolls and revenues of the next ensuing year.

s. 56. "With respect to actions brought in respect of any proceedings under the provisions of this act, if, before any action be brought, any party, having committed any irregularity, trespass, or other wrongful proceeding, in the execution of the act, or by virtue of any power or authority thereby given, make sufficient tender of satisfaction, the plaintiffs shall not recover in respect of such irregularity, trespass, or other wrongful proceeding;" with a power to "the party offending," if no tender has been made, to pay money into court before issue joined.

s. 84. "If any party, who shall be entitled to any compensation in respect of any lands, or of any interest therein, taken for or injuriously affected by the execution of the powers of this act, shall desire the amount of such compensation to be determined by a jury, it shall be lawful for such party to give notice in writing to the commissioners of such his desire," . . . and unless an agreement be come to within twenty-one days after the receipt of such notice, the commissioners shall issue their warrant to the sheriff to summon a jury accordingly, in the manner mentioned in subsequent sections, which is similar to the proceedings under the Lands Clauses Consolidation Act.

ss. 137 and 138 enact that the commissioners "shall make and maintain" the cut and sluice in question.

By s. 174 valuers are to be employed by the commissioners to assess the lands at a sum not exceeding 1*s.* per acre in one part of the district, and

1866

COE v. WISE.

June 13. *Keane, Q.C.* (*D. Brown* with him), for the plaintiff.

2*s.* 3*d.* in another, according to the different degree of benefit derived; so as to raise an annual sum of 1*s.* 6*d.* per acre on the whole of the lands: and by s. 182, the commissioners are to tax the lands annually, according to the valuation over and above certain taxes already fixed by a former act.

s. 217. "If any person or body, at any time after the drainage commissioners or any person employed or authorized by them shall have begun to carry this act into execution, shall happen to sustain any damage or injury in his lands, tenements, or hereditaments, goods or chattels, by or in consequence of any act of the commissioners, or their agents, workmen, or servants, for which such person shall have had no recompense or satisfaction, or for which no recompense or satisfaction is hereby otherwise provided, then and in every such case, if the commissioners or their agent and the party by whom such damage or injury shall be sustained shall not agree touching such damage or injury, the said damage or injury shall be ascertained and settled by a jury, in manner herein provided; and in case the commissioners shall not make such satisfaction or recompense for such damage or injury as shall be so assessed and settled, within twenty days after request made, it shall be lawful for the person aggrieved to apply to any three justices, who, upon proof made to them upon oath of nonpayment of such satisfaction and recompense, shall appoint one or more person or persons to receive the rates and tolls herein directed to be raised and paid to the commissioners, and thereout to pay all such damages as shall be so assessed and settled; and the money to be received by such receiver shall be received to the use of the person receiving damage as aforesaid, in order and course successively as such determination shall be in priority of time; and after such damages, so settled and assessed as aforesaid, shall be paid and satisfied, the power and authority of such receiver, for the purposes last mentioned, shall cease and determine. Provided, that the appointment of the receiver, and the powers and authorities hereby vested in him, shall in nowise lessen, prejudice, or have priority over the rights or remedies of any mortgagee of the taxes, tolls, or funds of the commissioners, under any provisions herein contained, but shall nevertheless take precedence of and have priority over all other liabilities and outgoings of the commissioners, and all other charges and expenses of carrying this act into execution; and the sinking fund hereinbefore directed to be raised and created shall (subject to the claims of any mortgagee) be available for the purpose of satisfying the amount of any such damage and injury; and the taxes and tolls shall not be reduced under the power in this act contained, while the amount of any such damage and injury shall remain unsatisfied; or, if reduced, shall be again revived and continued in force, and be applicable to the satisfaction of such damage and injury, until the amount thereof shall be fully paid and satisfied."

s. 237. The taxes, tolls, and moneys authorized by the several acts to be levied, raised, received, or taken by the commissioners, shall be applied—first, in payment of the expenses of the act; next (subject to the claims of persons lending money, authorized to be borrowed) "in executing and completing the works of drainage, &c.," and "for the general purposes of carrying the act into execution."

The decision of the House of Lords, in the *Mersey Docks* cases (1), is conclusive against the general exemption of trustees for public purposes from all liability to an action in their quasi-corporate capacity: and the question now depends upon what the legislature may be taken to have intended by the enactments of the statute under which the particular body of trustees or commissioners is established. In the present case, s. 237 of 7 & 8 Vict. c. cvi., as to the application of funds, is in as wide terms as the corresponding section in the *Mersey Docks* cases (2); and s. 20 is in larger terms, and enacts that all actions "in respect of any matter relating to the execution of this act," to be brought against the commissioners, may be brought in the name of the clerk. The clerk would not be personally liable: *Wormwell* v. *Hailstone* (3); he is, however, expressly protected by s. 22; and s. 21 empowers execution upon a judgment so obtained to be had against the goods belonging to the commissioners virtute officii. Again, s. 56 enables tender of amends to be made by any party for any irregularity, trespass, or other wrongful proceeding, which obviates the distinction taken by the majority of the Court below between acts of the commissioners themselves and those of their servants; and the presence of this power of tendering amends is a conclusive argument in favour of the liability to an action of the party who is empowered to tender it: *Southampton and Itchin Bridge Company* v. *Southampton Local Board of Health.* (4) When an act of commission is wrongful, both the employer and employed are liable; but when the wrong is the omission to perform a duty, as here, the employer alone is liable, and no action can be maintained by the person injured against the employed, who is liable only to the employer: *Pickard* v. *Smith* (5); *Young* v. *Davis.* (6) Blackburn, J., in delivering the opinion of the judges, in the *Mersey Docks* cases (7), observes, that this distinction is well stated by Williams, J., in *Pickard* v. *Smith* (8), shewing that where a duty is imposed and the performance omitted, the fact of it having been entrusted to a third person furnishes no excuse either in good sense or law. In such

(1) *Mersey Docks Trustees* v. *Gibbs*; *Same* v. *Penhallow*: Law Rep. 1 H. L. 93.
(2) See Law Rep. 1 H. L. at p. 106.
(3) 6 Bing. 668.
(4) 8 E. & B. 801; 28 L.J. (Q.B.) 41.
(5) 10 C. B. (N.S.) 470.
(6) 31 L. J. (Ex.) 250; 7 H. & N. 760.
(7) Law Rep. 1 H. L. at p. 114.
(8) 10 C. B. (N.S.) at p. 480.

1866

COE v. WISE.

case, the doctrine respondeat superior applies: *Stone* v. *Cartwright* (1); a doctrine which, it may be observed, was first applied by statute, not in the statute of Westminster 2, c. 43, but in c. 11, as is pointed out by Best, C.J., in *Hall* v. *Smith*. (2) The proposition of Lord Cottenham, in *Duncan* v. *Findlater* (3), that unpaid trustees for a public purpose can in no case be liable in their corporate or quasi-corporate capacity may be taken to be overruled; though the judgment of Erle, C.J., in *Holliday* v. *St. Leonard, Shoreditch* (4), seems to favour the same view.

[ERLE, C.J. I certainly never intended so wide a proposition.]

*Duncan* v. *Findlater* (3), however, was the case of trustees of a highway, who are in a very different position from the present commissioners; and the latter are very much in the position of a railway company, as they make a profit, though not for themselves, by the payment made for the benefit their works do to the land. Having allowed the water to escape, they are liable for the consequences: *Fletcher* v. *Rylands*. (5) *Brownlow* v. *Metropolitan Board of Works* (6), cited by Blackburn, J., in the opinion of the judges to the House of Lords, in the *Mersey Docks* cases (7), is a direct authority, in this court, that a public body are liable in their corporate capacity for damages caused by an irregularity, though within the general scope of their authority; and *Ohrby* v. *Ryde Commissioners* (8), shews that they are liable for the negligent omission of a duty imposed upon them by statute; that case is undistinguishable from the present in any one point. With regard to the want of sufficient funds to meet the judgment, that is no answer to the plaintiff's right to recover: *Ruck* v. *Williams* (9); and this was forcibly pointed out by Blackburn, J., in the court below. (10)

*Mellish, Q.C.* (*Sir F. Kelly, Q.C., O'Malley, Q.C.*, and *Newton*, with him), for the defendant. After the decision in the *Mersey*

(1) 6 T. R. 411.
(2) 2 Bing. at p. 160.
(3) 6 Cl. & F. at pp. 907—8.
(4) 11 C. B. (N.S.) at p. 204; 30 L. J. (C.P.) at p. 363.
(5) Law Rep. (1 Ex.) 265.
(6) 16 C. B. (N.S.) 546; 33 L. J. (C.P.) 233.
(7) Law Rep. 1 H. L. at p. 119.
(8) 33 L. J. (Q.B.) 296; 5 B. & S. 743.
(9) 3 H. & N. 308; 27 L. J. (Ex.) 357.
(10) See 33 L. J. (Q.B.), at p. 291; 5 B. & S. at pp. 465—6.

*Docks* cases (1), it would be useless to attempt to contend that the commissioners are not liable simply on the ground that they are public commissioners. The decision of each case, no doubt, must turn on the construction of the particular statute under which the commissioners are constituted, as said by Lord Campbell, C.J., in *Southampton and Itchin Bridge Company* v. *Southampton Local Board of Health.* (2) The Lord Chancellor, in the *Mersey Docks* cases (3), said that those cases could not be distinguished from *Parnaby* v. *Lancaster Canal Company* (4); but they were cases quasi ex contractu; in the present there is no contract of any kind between the plaintiff and the commissioners. The duty, if any, is a public one. They are not made a corporation, but are to be sued by their clerk; and the question, whether this action is maintainable, must depend on what actions the statute (7 & 8 Vict. c. cvi.) intended should be brought against the clerk, when (s. 20) it says: "In all actions and suits, in respect of any matter or thing relating to the execution of this act, to be brought by or against the commissioners, it shall be sufficient to state the name of two of them, or the name of their clerk." By that it was not intended that an action should be brought for damages caused by the negligence of the servants of the commissioners in the discharge of their duty; the proper course for the plaintiff was to have proceeded for compensation under s. 217.

[*Keane* objected that this point was not open to the defendant on the present appeal; but the Court intimated that, as it would at all events, be open on error, they would hear the argument at once.]

Assuming, then, that the commissioners were by their servants guilty of a breach of the duty imposed by ss. 137, 138, the remedy is given by s. 217, viz. by a compensation jury before the sheriff, under ss. 84 et seqq., in the same way as under the Lands Clauses Consolidation Act, which was passed the next year. This section gives a very stringent remedy; and payment is to be made by the receiver appointed by the justices, in priority of all but mortgage debts; this is, therefore, a much more efficient re-

(1) Law Rep. 1 H. L. 93.
(2) 8 E. & B. at p. 812; 28 L. J. (Q.B.) at p. 44.
(3) Law Rep. 1 H. L. at p. 122.
(4) 11 Ad. & E. 223.

1866

Coe v. Wise.

medy than by execution; and as the commissioners have no power to make rates, a mandamus could not be obtained to oblige them to make a rate to meet the judgment. A review of the statute 7 & 8 Vict. c. cvi., shews that the construction contended for is the true one. Section 17 vests lands acquired under the act, and all chattels, &c., provided for the purposes of the act, in the commissioners. Section 19 only applies to contracts, and exempts the commissioners from personal liability by reason of any instrument made by them under the authority of the act, and the damages and costs are to be defrayed out of the chattels belonging to the commissioners virtute officii, "unless the damages and charges had arisen in consequence of the wilful default of the commissioner incurring the same." Section 20 enacts that, "in all actions and suits in respect of any matter or thing relating to the execution of the act, to be brought by or against the commissioners, it shall be sufficient to state the names of any two of the commissioners, or the name of their clerk, as plaintiff or defendant." Section 21 enables execution to be had on the judgment in such action against the goods belonging to the commissioners virtute officii. Section 22 protects the clerk, or any commissioner, from personal liability, unless the action shall have been caused by his own wilful neglect or default, or the action has been brought without the order of the commissioners. These sections, however, cannot apply to the present cause of action which does not arise "in respect of any matter or thing relating to the execution of the act." Sections 36 and 49 give a limited power only of borrowing money "for the purposes of the act," which this is not. Section 56, as to tender of amends, has not the effect contended for by the other side; it does not relate at all to an action against the commissioners, but to an action to be brought against "any party" for a *wrongful* proceeding in the execution of the act; it applies only to an individual offender. Sections 84 and 92 shew how compensation is to be obtained by a sheriff's jury for any injury caused by the proper exercise of the powers of the act. Sections 137 and 138 impose the duty of making and maintaining the cut and sluice, the non-maintenance of which caused the damage to the plaintiff. Sections 174, 182, and 183 give a limited power only of taxing the district. And after some un-

important sections, comes s. 217, by which it is intended to enact how far and in what way damages are to be recovered for an *improper* act of the commissioners or their servants; and the mode is to be by a compensation jury before the sheriff. It may be contended that the present is not damage by an act, being caused by an omission, but that is an act of negligence as much as an act of commission; and it may also be said to be caused by a positive act, as the commissioners made the sluice from which the damage arose. *Broadbent* v. *Imperial Gas Company* (1), *Lawrence* v. *Great Northern Railway Company* (2), and *New River Company* v. *Johnson* (3), are in point, as shewing the distinction between what is subject of compensation and action; and that if a particular remedy is pointed out, that must be pursued. Section 237 is the last section of importance, which directs the appropriation of the funds, and they are to be applied, after certain specific objects, to "the general purposes of carrying the act into execution." But how can this be said to include payment of damages in an action for negligence? Cockburn, C.J., points out in the court below (4), that by this section the legislature could not intend an action should be maintainable against the commissioners for negligence of their servants, and that that view is confirmed by the provision in s. 217, as to compensation. On a review, therefore, of the act, it appears that s. 217 expressly authorizes the payment of compensation as one of the purposes of the act; but the limited fund raised under the act cannot be applied except under that section to any such purpose; which seems to shew conclusively that proceedings for compensation and not action is the remedy given by the statute.

*Keane, Q.C.*, in reply. Section 217 only applies to compensation to be made for damage caused by acts, of the commissioners or their servants, authorized by the statute. Under a similar clause, s. 144 of Public Health Act, 11 & 12 Vict. c. 63, in *Southampton and Itchin Bridge* v. *Southampton Local Board* (5), Lord Campbell, C.J., points out that, for a wrongful act, the

(1) 7 De G. M. & G. 436; 26 L. J. (Ch.) 276.

(2) 16 Q. B. 643; 20 L. J. (Q.B.) 293.

(3) 2 E. & E. 435; 29 L. J. (M.C.) 93.

(4) 33 L. J. (Q.B.), at pp. 294—5; 5 B. & S. at pp. 473—4.

(5) 8 E. & B. at p. 812; 28 L. J. (Q.B.) at p. 44.

1866

COE v. WISE.

remedy must be by action, and not for compensation. *Clothier* v. *Webster* (1), and *Brine* v. *Great Western Railway Company* (2), shew that if the damage be caused by negligence in carrying out what is authorized by the statute, action, and not proceedings for compensation, is the remedy. And in such a case, it is no answer that the commissioners have no funds: per Crompton, J., in *Hartnall* v. *Ryde Commissioners* (3); *Bush* v. *Martin*. (4)

*Cur. adv. vult.*

June 14. The judgment of the Court (Erle, C.J., Willes, J., and Channell and Pigott, BB.) (5) was delivered by

ERLE, C.J. This action was brought for a breach of duty in nonfeasance in not maintaining a sluice and cut.

It is clear that the duty was imposed on the commissioners by sections 137 and 138 of the Drainage Act (7 & 8 Vict. c. cvi.), and was not performed, as the sluice and cut were not maintained, and the plaintiff's land was damaged by inundation.

At the trial the verdict was for the plaintiff; and a rule to set aside that verdict and enter it for the defendant was made absolute in the court below, on the ground, as stated in the rule, that the commissioners were a public body bound to discharge a public duty, without reward and without funds, and so were not responsible for the negligence of those whom they employed.

The invalidity of this ground of defence is shewn by the opinion of the judges, delivered to the House of Lords, by Blackburn, J., in the *Mersey Docks* cases, and is established by the decision of the House thereupon. (6) The judgment, therefore, of the Court below is reversed by reason of this decision in the House of Lords; and we further hold that the action is maintained for the reasons stated by Blackburn, J., in this case in the court below. (7)

The authorities are so thoroughly examined, and the law deduced therefrom is so clearly and precisely stated by that learned

(1) 12 C. B. (N.S.) 790; 31 L. J. (C.P.) 316.

(2) 2 B. & S. 402; 31 L. J. (Q.B.) 101.

(3) 4 B. & S at p. 366; 33 L. J. (Q.B.) at p. 40.

(4) 2 H. & C. 311; 33 L. J. (Ex.) 17.

(5) Montague Smith, J., was present during part only of the argument.

(6) Law Rep. 1 H. L. 93.

(7) 33 L. J. (Q.B.) at p. 288; 5 B. & S. at p. 458.

judge on those two occasions, that we think it best to accept his terms and concur in his conclusions, and so the appeal here is disposed of in favour of the appellant.

This determination of the appeal was not opposed by the defendant's counsel upon the argument; but he brought forward a new ground of defence which would at all events be admissible upon error, and which, therefore, we heard argued, viz. that the right of action is taken away because compensation is given for the injury of which the plaintiff complains by section 217 of the Drainage Act (7 & 8 Vict. c. cvi.).

The learned counsel assumed that if compensation is given for a matter under this statute, the right of action for the same matter at common law is taken away. It is not necessary to decide whether if the damage complained of had resulted from an "act" within the 217th section, the procedure under that section must have been pursued to the exclusion of the jurisdiction of the superior courts, or whether those courts have a concurrent jurisdiction. As a peculiar remedy is provided, the former would probably be the correct conclusion: see *Fenton* v. *Trent and Mersey Navigation* (1); *Rochdale Canal Company* v. *King* (2) and the cases therein referred to; and *Chapman* v. *Milvain.* (3)

We are, however, of opinion that section 217 applies only to the authorized acts of the commissioners, and to damage or injury (which in this act are used as equivalent terms) resulting therefrom, such being the ordinary scope of like clauses: see *Rochdale Canal Company* v. *King* (2); *Broadbent* v. *Imperial Gas Company* (4); *Lawrence* v. *Great Northern Railway Company.* (5) Still, if it be granted, for the purpose of this judgment, both that Mr. Mellish's assumption is right, and also that section 217 might have application to unauthorized as well as authorized acts of the commissioners, we are, nevertheless, of opinion that this cause of action is not a subject of compensation within the section.

The words are, "If any person, at any time after the said commissioners shall have begun to carry this act into execution, shall

(1) 9 M. & W. 203.
(2) 14 Q. B. 122; 18 L.J. (Q.B.) 293.
(3) 5 Ex. 61; 19 L.J. (Ex.) 228.
(4) 7 De G. M. & G. 436; 26 L. J. (Ch.) 276.
(5) 16 Q. B. 643; 20 L.J. (Q.B.) 293.

1866

COE v. WISE.

sustain any damage or injury in consequence of any *act* of the commissioners, their agents, servants, or workmen, for which no recompense is hereby otherwise provided," he may proceed for compensation.

It was contended by the learned counsel for the defendant, that all damage or injury caused by the execution of the works was provided for by section 84 and other sections; and that section 217 was intended to take away all rights of action against the commissioners for any act done by them; and that, although in express terms it only included any act of the commissioners, yet it extended also to any default, as an omission to act might in some sense be said to be an act; and he further relied on the provisions relating to the funds to be raised by rates and tolls, and the disposition thereof under the statute (1), as confirmatory of the supposed intention to exempt the commissioners from liability for any such cause of action as is here in question. But we are of the contrary opinion.

The words of the section do not in their ordinary sense comprise the cause of action in question. The commissioners are not sued for any act done by them. The cause of action is for nonfeasance,—for an omission on the part of their agents contrary to their intention and against their will. If the legislature intended to exempt the commissioners from liability to action, we think that plainer words would have been used. Section 217 follows sections giving powers to the commissioners to interfere with the rights of property. It has operation by securing compensation in those cases; it also may have operation in securing compensation for damages arising from time to time not before provided for; when the original execution of the works did not cause damage, or damage which had been a former subject of compensation. On the other hand, it appears that the legislature did not intend to exclude all liability to action, because by section 20 provision is made for procedure in actions against the commissioners in respect of any matter or thing relating to the execution of this act, by allowing any two commissioners, or the clerk, to be made defendants; and by section 56 tender of amends in actions against the commissioners is authorized.

(1) See ss. 174—182 and s. 237 of 7 & 8 Vict. c. cvi.

1866

COE v. WISE.

We therefore think that section 217 has not the effect contended for on behalf of the defendant, and that the judgment should be for the plaintiff.

*Judgment reversed and rule discharged.*

Attorney for plaintiff: *Wilkin.*
Attorneys for defendant: *Meredith, Lucas, & Co.*

END OF TRINITY TERM.

# REGULÆ GENERALES.

*Pursuant to Act* 28 *Vict. cap.* 45.

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## MICHAELMAS VACATION, 1865.

WHEREAS by an act passed in the session of Parliament held in the 28th year of the reign of Her Majesty, c. 45, entitled "An Act to provide for the collection by means of Stamps of Fees payable in the Superior Courts of Law at Westminster, and in the offices belonging thereto," it is provided by the third section thereof that the Commissioners of Her Majesty's Treasury, with the concurrence of the Lord Chief Justices and of the Lord Chief Baron, may from time to time make such rules as seem fit for regulating the use of the stamps under this act, and particularly for prescribing the application thereof to documents from time to time in use or required to be used for the purposes of such stamps, and for ensuring the proper cancellation of adhesive stamps, and keeping account of such stamps; Now we, being two of the Lords Commissioners of Her Majesty's Treasury, with the concurrence of the Lord Chief Justices and of the Lord Chief Baron, do hereby order and direct that the following rules be observed in respect to stamps used in the Superior Courts of Common Law, and in the several offices connected therewith; the Crown Office, Queen's Bench; the Office of Registration of Certificates, &c., of Acknowledgments of Deeds of Married Women, Court of Common Pleas; the Office of Registrar of Judgments, &c., Common Pleas; the Queen's Bench Remembrancer's Office, Court of Exchequer; and in the Judges' Chambers; to take effect on and after the 1st day of January, 1866.

1. The stamps to be used for collecting the fees payable in the several offices in the Courts of Common Law, at Westminster, and

in the Judges' Chambers, by virtue of the above act, shall, subject to the provisions of the seventh and eighth of these rules, be stamped or affixed at the expense of the parties liable to pay such fees on or to the vellum, parchment, or paper on which the proceedings, in respect whereof such fees are payable, are written or printed, or which may be otherwise used in reference to such proceedings.

2. Where any of such fees are payable in respect of any matter or thing to be done by any officer or in any office of the said courts, or at the Judges' Chambers, and it shall not have been customary to use any written or printed document or paper in reference to such matter or thing whereon the stamp could be stamped or affixed, the party or his attorney requiring such matter or thing to be done, or permitted to be done, shall make application for the same by a præcipe or short note in writing or print, and a stamp denoting the amount of the fee so payable shall be stamped or affixed to such præcipe or note.

3. All adhesive stamps affixed to any paper or document presented to or kept in the possession of any of the officers of the said courts, or of the clerks to the judges, shall, before the act is done or permitted to be done, in respect of which the fee denoted by such stamp is payable, be effectually cancelled by some officer of the said courts, or by one of the said clerks to the judges, by obliterating the same by means of a hand-stamp and printing ink, showing the date of the cancellation, and no such document shall be filed or delivered out until the stamp thereon shall have been cancelled or defaced in manner aforesaid.

4. That when any summons, order, or other document has been issued by mistake, and the stamp thereon has been cancelled without having been legitimately used, the Master, Associate, or other proper officer of the department to which the fee is payable, or the Judge's clerk, shall certify that such stamps are fit subjects for allowance, and it shall be competent to the Board of Inland Revenue, upon the presentation of such certificate, to allow the amount thereof.

5. That distributors of stamps, and all persons licensed to sell

stamps in England and Wales, shall be permitted to sell the stamps above referred to, and that an office be provided in or attached to the Judges' Chambers for the sale of stamps.

6. The several officers of the said Courts, and the clerks to the several Judges shall, on or before the 30th day of April in each year, make out an account of all stamps cancelled in their respective offices, specifying the number of each denomination, and shall render such account to the Lords Commissioners of Her Majesty's Treasury, and the first of such accounts shall be for the three months ended 31st March, 1866, and the second of such accounts for the year ended 31st March, 1867, and so forth.

7. And we do hereby order and direct that the stamps to be used for collecting the fees payable in the offices of the several Masters of the Courts of Common Law, shall be stamped or affixed at the expense of the parties liable to pay such fees on the several documents mentioned in the second column of the subjoined Table.

| *Fees taken in the Offices of the Masters of the Courts of Queen's Bench, Common Pleas, and Exchequer, in respect of* | *Stamps to be affixed upon* |
|---|---|
| Every Writ | Præcipe |
| Every Appearance | Appearance Piece, which shall be of linen paper of the same size and shape as the Parchment Appearance Pieces heretofore used |
| Filing every Document | Document filed |
| Amending any Proceeding | Order to amend |
| Every Rule | Rule |
| Every Judgment | Entry in Masters' Book |
| Taxing Bill of Costs | Bill taxed |
| References to, or Examinations by Masters | Certificate, Examination, or Report |
| Payment of Money into Court | Entry in Masters' Book |
| Every Certificate | Certificate |
| Office Copies of Documents | Office Copy |
| Searches | Præcipe or Note filed |
| Every Affidavit or Affirmation | Affidavit, &c. |
| Allowance and Justification of Bail, taking special Bail as Commissioners | Bail Piece |
| Filing Affidavit and enrolling Articles of Clerkship | Entry in Masters' Book |
| Every re-admission of an Attorney | Rule for re-admission |

8. And we do further order and direct, that a book or books be kept in the offices of the Associates of the Courts of Queen's Bench, Common Pleas, and Exchequer, in which book or books shall be entered the names of the several causes, against which shall be placed adhesive stamps of the value required during the different stages, and it shall be the duty of the Associate, or of such one of his clerks as he shall direct to do it, to cancel such stamps in the manner hereinbefore provided, immediately after they are placed in such books.

Given under our hands at the Treasury Chambers, Whitehall, this fifteenth day of December, One thousand eight hundred and sixty-five.

RUSSELL.
E. H. KNATCHBULL-HUGESSEN.

We do hereby signify our concurrence in the before-mentioned Rules and Regulations.

A. E. COCKBURN,
Lord Chief Justice of the Court of Queen's Bench.

W. ERLE,
Lord Chief Justice of the Court of Common Pleas.

FRED. POLLOCK,
Lord Chief Baron of the Court of Exchequer.

16th December, 1865.

# INDEX.


PAGE

ABSENTING HIMSELF FROM SERVICE, effect of servant's .. 417
*See* MASTER AND SERVANT. 1.

ACTION, liability of public commissioners to, for negligence of servants .. 711
*See* NEGLIGENCE. 1.

——— by surviving partners or executors, practice as to interrogatories in .. .. .. .. .. .. .. .. .. .. 89
*See* INTERROGATORIES. 1.

——— for a reward offered for information leading to the apprehension of thieves .. .. .. .. .. .. .. .. 641
*See* REWARD, ACTION FOR.

ADJUDICATION of bankruptcy against pauper prisoner, effect of .. 494
*See* BANKRUPTCY ACT, 1861. 1.

ADMINISTRATION OF ASSETS, priority of judgment debts .. 355
*See* JUDGMENT DEBT.

AFFREIGHTMENT, contract of, governed by what law as to sea damage 115
*See* SHIP AND SHIPPING. 1.

AGENT: *See* PRINCIPAL AND AGENT.

AGREEMENT: *See* CONTRACT.

APPEAL, notice of, against shutting up a road .. .. .. .. 36
*See* INCLOSURE ACT.

———, to what sessions, against order adjudging settlement of pauper lunatic .. .. .. .. .. .. .. .. .. 385
*See* POOR. 5.

APPENDIX to special case must be numbered in paragraphs .. .. 444
*See* METROPOLITAN POLICE ACTS.

ASSETS, order of administration of .. .. .. .. .. .. 355
*See* JUDGMENT DEBT.

ASSIGNMENT OF DEBT, equitable plea of .. .. .. .. 372
*See* PRACTICE. 2.

AUCTION, duty of auctioneer, on sale by .. .. .. .. .. 352
*See* PRINCIPAL AND AGENT. 2.

AUCTIONEER, duty of, in receiving deposits .. .. .. .. 352
*See* PRINCIPAL AND AGENT. 2.

AUTHORITY of master of ship to bind owners by his contracts .. .. 115
*See* SHIP AND SHIPPING. 1.

——— of counsel to consent to withdrawal of juror .. .. 379
*See* COUNSEL.

PAGE

AVERAGE, liability to contribute to, effect of, in determining whether ship a constructive total loss .. .. .. .. .. .. 520
*See* MARINE INSURANCE. 1.

BAILIFF, levying church-rates by distress, liability of .. .. .. 405
*See* CHURCH-RATES.

BAILMENT, by pawn or pledge, effect of .. .. .. .. .. 585
*See* PAWN.

BANKRUPTCY, effect of adjudication of .. .. .. .. .. 494
*See* BANKRUPTCY ACT, 1861. 1.

———— ACT, 1861 (24 & 25 Vict. c. 134)—*Bankrupt—Adjudication of pauper Prisoner under s.* 99—*Relation of, under s.* 103.] Section 103 of the Bankruptcy Act, 1861,—which enacts that every adjudication against any prisoner for debt so brought up as aforesaid shall, unless the Court shall otherwise direct, have relation back to the date of his commitment or detention,—has reference to a prisoner for debt "brought up" before the county court, and adjudged bankrupt upon his own petition in formâ pauperis, under ss. 98, 99. As the adjudication is to have relation back to the commitment absolutely, and not merely as an act of bankruptcy, a bonâ fide dealing with the bankrupt after the commitment is void, and cannot be protected by s. 133 of the Bankruptcy Act, 1849. Therefore, where goods were assigned by S. to the defendant, but S. remained in possession of them up to his arrest under a ca. sa., and after his commitment to gaol the defendant took possession of the goods, and S. was afterwards adjudged a bankrupt on his own petition in formâ pauperis under ss. 98, 99 of the Bankruptcy Act, 1861:—*Held*, that the goods passed to S.'s assignee under s. 125 of the Bankruptcy Act, 1849, as in his order and disposition with the consent of the true owner; and that the defendant could not avail himself of the protection of s. 133.
BRAMWELL *v.* EGLINTON .. .. .. .. Ex. Ch. 494

2. ————, *Debtor and Creditor—Deed of Composition—Release.*] A deed of composition under s. 192 of the Bankruptcy Act, 1861, between a debtor, sureties, and his creditors, contained a clause that the parties of the third part did release all actions, . . . contracts, . . . whatsoever, which the parties of the third part now have, or which they at any time hereafter may have against, J. H., by reason, or on account of any debt or debts, . . . . contracts . . . from the beginning of the world to the day of the date of the deed:—*Held*, that the release was not unreasonable, inasmuch as it must be taken to be restrained by the whole scope and object of the deed, and confined to causes of action which could be proved by a creditor in bankruptcy.
HASELGROVE *v.* JOHN HOUSE .. .. .. .. .. 101

3. ————, *Debtor and Creditor—Deed of Composition—Covenant to pay Scheduled Creditors.*] A deed of composition under s. 192 of the Bankruptcy Act, 1861, between the debtor of the first part, and the several persons whose names and seals were thereunto subscribed and set, being creditors of the debtor, and all other persons being creditors of the debtor, of the other part, after reciting that the debtor was indebted to the parties of the second part, contained a covenant by the debtor with the said persons of the second part, that he would pay "unto the said persons respectively the several sums of money placed opposite to the respective names of the said persons in the third column of the schedule to the deed, being the amount of the composition agreed upon, by two instalments on certain days," and it was declared that until the debtor should make

PAGE

default the parties of the same part should not bring any action in respect of their several debts specified in the several columns of the schedule:—*Held*, that the covenant as to payment and the covenant not to sue must override the generality of the earlier part of the deed, and were confined to the persons and their debts specified in the schedule; and therefore that the deed did not afford an equitable defence to an action by a creditor not named in the schedule.

BUVELOT *v.* MILLS .. .. .. .. .. .. .. 104

4. BANKRUPTCY ACT, 1861, *Debtor and Creditor—Composition Deed—Partnership Debt—Joint and Separate Liability.*] A composition deed, in the form of Schedule D to the Bankruptcy Act, 1861, made between the defendant and his two partners of the one part, and certain trustees on behalf of the undersigned creditors of the defendant and his two partners of the other part, by which all the estate and effects of the defendant and his two partners were assigned by the defendant and his two partners for the benefit of the creditors of the defendant and his two partners, affords no answer on equitable grounds to an action against the defendant by a creditor of the defendant for his separate debt.

EUROPEAN CENTRAL RAILWAY COMPANY *v.* W. B. WESTALL .. 167

5. ————————, *Deed of Inspectorship—Unreasonable Clauses—Power to pass Trustees' Accounts and give Discharge to Trustees—Power to Appoint new Trustees.*] A deed of inspectorship made between a debtor and his creditors under the Bankruptcy Act, 1861, contained the following clauses:—1. That a resolution signed by the majority in number and value of the creditors, parties to the deed, or bound by it, should be effectual for the allowance and passing of the accounts of the trustees, and for discharging them from the trusts of the deed. 2. That in case any trustee appointed by the deed should die, or refuse, or become incapable to act in the trust, a majority of the creditors present at a meeting of the creditors of the debtor convened for that purpose should choose a person to be trustee:—*Held*, that the clauses were not unreasonable, and that the deed was binding on the non-assenting creditors.

BOND AND ANOTHER *v.* WESTON .. .. .. .. .. 169

6. ————————, *Composition Deed—Party to Indenture by Description.*] A deed of composition—being an indenture made between the debtor A. W. of the first part and all the creditors of A. W. of the second part, by which the debtor covenants with the several persons parties thereto of the second part respectively, to pay a certain composition on their debts unto the several persons parties &c., being all and every his present creditors; and the several creditors parties thereto &c. release their several debts &c.—is a valid deed under s. 192 of the Bankruptcy Act, 1861, and binding on non-assenting creditors; for every creditor is made a party by the general description of all the creditors of A. W., and can therefore sue on the covenant. *Gresty* v. *Gibson* followed.

REEVES AND ANOTHER *v.* WATTS .. .. .. .. .. 412

7. ————————, *Certificate of Registration of Deed of Assignment—Protection to Sheriff—Escape.*] The production of a certificate, valid on its face, of the registration of a deed of assignment, under s. 192 of the Bankruptcy Act, 1861, by a debtor for the benefit of his creditors, justifies the sheriff, under s. 198, in releasing the debtor whom he has arrested on a ca. sa. at the suit of a creditor, although the deed be in fact invalid as between the debtor and non-assenting creditors.

LLOYD *v.* HARRISON .. .. .. .. Ex. Ch. 502

PAGE

BANKRUPTCY ACT, 1861, *See* DEBTOR AND CREDITOR.

BARRISTER, authority of, to consent to withdrawal of juror .. .. 379
*See* COUNSEL.

BEER ACT: *See* LICENSED VICTUALLERS.

BEER-HOUSE—*Hours for keeping Open—"Parish or Place"—3 & 4 Vict. c. 61, s. 15.*] The 3 & 4 Vict. c. 61, s. 15, enacts that no person licensed to sell beer or cider by retail shall keep his house open for the sale of it after eleven at night within any city, cinque port, town corporate, parish, or place, having a population exceeding 2500, nor after ten elsewhere. By the interpretation clause "parish or place" includes hamlet. The appellant's house was within a hamlet having less than 2500 inhabitants, but the parish to which the hamlet belonged had more than that number:—*Held*, that the appellant had the privilege of keeping his house open till eleven: for though the hamlet might be a "place" within the statute, the house was still within "a parish" with a population of more than 2500.
SMITH, Appellant; REDDING, Respondent .. .. .. 489

BILL OF EXCHANGE, liability of principal for acceptance of, by agent 97
*See* PRINCIPAL AND AGENT. 1.

———————, payment to auctioneer of deposit by, effect of .. 352
*See* PRINCIPAL AND AGENT. 2.

BOARD OF HEALTH, transfer of powers of, to municipal corporation 549
*See* LOCAL BOARD OF HEALTH. 1.

BOTTOMRY, contract of, governed by what law .. .. .. .. 115
*See* SHIP AND SHIPPING. 1.

BREAK OF RESIDENCE, what amounts to, under poor law .. 21, 227
*See* POOR. 1, 4.

BURIAL: *See* BURIAL ACTS.

——— ACTS—20 & 21 *Vict. c.* 81, *s.* 23; 22 *Vict. c.* 1, *s.* 1—*Order in Council as to Burial Ground—Burial Ground unused at the time.*] Section 23 of the 20 & 21 Vict. c. 81, enacts that it shall be lawful for the Queen in Council, from time to time, to order such acts to be done by and under the directions of the churchwardens, or such other person as may have the care of any vaults or places of burial, for preventing them from becoming or continuing dangerous or injurious to the public health:—*Held*, that the section applies only to those places of burial which are consecrated or conveyed irrevocably for the purposes of burial, or which were in the care of persons as places of burial at the time the act passed.

From the year 1679 till 1844 land was held by a corporation from time to time under long leases as a burial ground, and afterwards from year to year, till 1855. No burials took place after 1844; and in 1854 an Order in Council, under 15 & 16 Vict. c. 85, s. 2, was made that burials should be discontinued. In 1857, the freeholder demised the ground for ninety-nine years to S., who entered and put some rubbish on the land; in 1859, S. demised to the plaintiff for fifty years, and he entered upon the land. In the same year an Order in Council was made, under 20 & 21 Vict. c. 81, s. 23, directed to "the person having the care of the burial ground," and served on the plaintiff, to do certain acts. The plaintiff disregarded the order, and thereupon the Secretary of State made an order, under 22 Vict. c. 1, s. 1, on the churchwardens of the parish in which the ground was situate to do the acts: the churchwardens having entered in pursuance of the order:—*Held*, that the sections did not apply, and that the orders were invalid, and the churchwardens therefore liable as trespassers.
FOSTER *v.* DODD AND ANOTHER .. .. .. .. .. 475

PAGE

BURIAL GROUNDS, provisions for the management of .. .. .. 475
*See* BURIAL ACTS.

BY-LAW, effect, validity and construction of .. .. .. .. 7, 10
*See* RAILWAY COMPANY. 1, 2.

CARRIERS—*Carriers Act* (11 *Geo.* 4, *and* 1 *Wm.* 4, *c.* 68)—*Contract to carry partly by Land and partly by Sea.*] Where there is one entire contract to carry partly by land and partly by sea, the contract is divisible, and as to the land journey the carrier is within the protection of the Carriers Act, 11 Geo. 4, & 1 Wm. 4, c. 68.
LE CONTEUR *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY .. .. .. .. .. .. .. .. 54

———— ACT: *See* CARRIERS.

CASE, duty of justices to state .. .. .. .. .. .. 388
*See* FRIENDLY SOCIETY. 1.

CATTLE—"*Conducting*" *or* "*Driving*" *Cattle—Sunday.*] A local act for a parish, in which was a large cattle market, enacted, that it shall not be lawful for any drover or other person to conduct or drive through any of the streets in the parish any oxen, sheep, or other cattle, during Sunday:—*Held*, that a person driving a van with horses, in which were calves being conveyed to the market, was not "driving" or "conducting" cattle within the meaning of the statute.
TRIGGS, Appellant; LESTER, Respondent .. .. .. .. 259

CERTIFICATE, liability of person taking game without .. .. .. 87
*See* GAME. 1.

———— of justices under 5 & 6 Wm. 4, c. 50, s. 85, validity of .. 648
*See* HIGHWAY. 3.

———— of clearance, effect of sailing without .. .. .. 162
*See* SHIP AND SHIPPING. 2.

———— of registration of deed under s. 192 of Bankruptcy Act, 1861, effect of .. .. .. .. .. .. .. .. 502
*See* BANKRUPTCY ACT, 1861. 7.

CHOSE IN ACTION, equitable plea of assignment of .. .. .. 372
*See* PRACTICE. 2.

CHURCH-RATES—*Charges for Distress—Liability of Bailiff to Penalties* 53 *G.* 3, *c.* 127, *s.* 7—57 *G.* 3, *c.* 93, *ss.* 1 *&* 2, *and Schedule*—7 *&* 8 *G.* 4, *c.* 17, *s.* 1.] By 53 G. 3, c. 127, s. 7, church-rates to the amount of 10*l.* may be enforced under a warrant of two justices, by distress and sale (appraisement not being made necessary) of the defaulter's goods, returning the overplus, after deducting the necessary charges. By 57 G. 3, c. 93, s. 1, the costs of distress for rent not exceeding 20*l.* are limited to the sums set forth in the schedule; by s. 2 any person who levies, takes, or retains from the produce of the goods sold under the distress, any other or greater charges than are mentioned in the schedule, or makes any charge for anything mentioned in the schedule and not really done, may be adjudged by a justice to pay treble the amount so unlawfully taken. In the schedule 6*d.* in the pound is allowed for appraisement. By the 7 & 8 G. 4, c. 17, the provisions, penalties, &c., of the 57 G. 3, c. 93, are to extend, be applied, and put in execution, so far as the same are applicable and capable of being put in execution, with respect to any distress for poor-rates, church-rates, &c., when the sum does not exceed 20*l.*, and the two acts are to be read together. The respondent being charged with a warrant of distress to enforce the amount of a church-rate under 10*l.* from the appellant, levied on his goods, and sold them by private contract; but afterwards

PAGE

bonâ fide thinking this course erroneous, he induced the purchaser to rescind the contract, and then sold the goods by auction, after appraisement, &c. He retained (inter alia) the amount paid for appraisement, under 6*d.* in the pound, and tendered the overplus to the appellant:—*Held*, that the respondent was not liable to be convicted under the 57 G. 3, c. 93, s. 2; for that, though he had been mistaken, he had acted bonâ fide, he had not taken other or greater charges than were allowed by the schedule, nor charged for what was not really done.
NOTT, Appellant; BOUND, Respondent .. .. .. .. 405

COMMISSIONERS for public purposes, liability of, for negligence of servants .. .. .. .. .. .. .. .. 711
*See* NEGLIGENCE. 1.

COMMON LAW PROCEDURE ACT, 1854, s. 51 .. .. 89, 628
*See* INTERROGATORIES. 1, 2.

——— s. 63 .. .. .. 77
*See* DEBTOR AND CREDITOR. 1.

COMPANY: *See* RAILWAY COMPANY.

COMPENSATION, owner of house may recover, under Railways or Lands Clauses Consolidation Act, when .. .. .. .. .. 130
*See* RAILWAY COMPANY. 3.

——— under Lands Clauses Consolidation Act .. 237, 529
*See* LANDS CLAUSES CONSOLIDATION ACT. 1, 4.

——— TO LORD OF MANOR: *See* COPYHOLD.

COMPOSITION DEED: *See* BANKRUPTCY ACT, 1861.

CONDITIONS, what are unreasonable in deed under s. 192 of Bankruptcy Act, 1861 .. .. .. .. .. .. .. .. 101, 169
*See* BANKRUPTCY ACT, 1861. 2, 5.

CONFLICT of laws, as to incidents of contract .. .. .. .. 115
*See* SHIP AND SHIPPING. 1.

CONSTRUCTION of lease .. .. .. .. .. .. .. 38
*See* POOR. 2.

——— of contract by Government officials .. .. .. 173
*See* CONTRACT BY GOVERNMENT OFFICIALS.

——— of promissory note .. .. .. .. .. 376
*See* PROMISSORY NOTE.

——— of warranty on sale of horse .. .. .. .. 463
*See* WARRANTY.

——— of Will .. .. .. .. .. .. 156, 570
*See* WILL. 1, 2.

CONSTRUCTIVE total loss, what amounts to .. .. .. .. 520
*See* MARINE INSURANCE. 1.

CONTRACT, breach of, by railway company .. .. .. .. 7
*See* RAILWAY COMPANY. 1.

——— to carry partly by land and partly by sea, effect of .. .. 54
*See* CARRIERS.

——— by corporation not under seal, effect of .. .. .. .. 620
*See* CORPORATION.

——— BY GOVERNMENT OFFICIALS—*Construction—Implied Covenant—Petition of Right—Practice—Right to begin on Cross Demurrers.*] By articles of agreement between the Lords Commissioners

PAGE

of the Admiralty, on behalf of the crown, and C., in consideration of the payments therein stipulated, C. covenanted that he would during the continuance of the contract convey to the satisfaction of the commissioners the mails which should from time to time by the commissioners or the Postmaster General be required to be conveyed between Dover and Calais, and Dover and Ostend, by means of a sufficient number (not less than six) of vessels of certain tonnage, and properly officered, manned, and equipped. That one or more of such vessels should be at all times ready to convey the Bombay, India, and other distant mails, or for other special service for the Government between Dover and Calais without any charge beyond the subsidy thereinafter mentioned, and also for the like special service between Dover and Ostend, for which the commissioners were to pay 58*l.* each voyage. In addition, it was to be lawful for the commissioners to require the contractor to provide vessels to convey distinguished persons not exceeding twelve voyages from port to port in any one year free of all charge beyond the said subsidy; but if more than twelve in a year, the voyages in excess to be paid for at the rate of 23*l.* each. That one of such vessels should leave Dover and Calais respectively every week-day, and one leave Dover and Ostend respectively every alternate week-day. Penalties were then provided for the observance of the contract by the contractor. The commissioners in consideration of the premises, and of the contractor at all times strictly performing the covenants and agreements on his part, agreed, on behalf of the crown, that they would pay him by bills at seven days a sum out of moneys to be provided by parliament, after the rate of 18,000*l.* per annum, by quarterly payments; the first payment to be three months from the commencement of the service. The contract was to commence from the date and continue for eleven years. The contractor was to be at liberty to employ the vessels in other services, subject to the penalties provided, if he was unable also to perform the services contracted for:—*Held*, that there was in the above agreement only a covenant by the commissioners, on behalf of the crown, that, in consideration of the contractor performing his part of the contract, by having vessels always ready for the service, the crown would pay him if parliament provided the funds; and that there was no implied covenant on the part of the commissioners to employ the contractor; and that a petition of right, founded on the agreement, and alleging that the commissioners had refused to employ the contractor to carry the mails, and did not nor would permit him to perform the agreement, and prevented him from carrying the mails, and claiming damages, could not be maintained. On the argument of cross demurrers, the late practice in the Court of Queen's Bench will at present be adhered to; and the plaintiff, and not the party first demurring, has a right to begin.

CHURCHWARD *v.* THE QUEEN .. .. .. .. .. 173

COPYHOLD—*Waste of Manor—Consent of Homage—Condition—Enfranchisement*—15 *&* 16 *Vict. c.* 51, *and* 21 *&* 22 *Vict. c.* 94—*Compensation to Lord.*] The lord of the manor of H., with the consent of the homage, granted a piece of the waste of the manor to C., to be held by copy of court roll, on condition that no buildings should be erected or trees or shrubs planted on the same, and reserving power to the lord and to certain copyholders to enter and remove any buildings erected or trees planted thereon. This reservation to the copyholders was without consideration. C. assigned the piece of land to B.; B. gave to the lord a notice under 15 & 16 Vict. c. 51, s. 2, of his wish to enfranchise:—*Held*, that after the enfranchisement B. would have an estate of freehold discharged from the conditions; and that the lord was entitled to equivalent compensation.

BRABANT, Appellant; WILSON, Respondent .. .. .. 41

PAGE

COPYRIGHT OF DESIGNS ACTS—5 & 6 *Vict. c.* 100, *ss.* 3, 15; 21 & 22 *Vict. c.* 70, *s.* 5—*Registration of Pattern itself.*] The plaintiff registered, in class 12 (s. 3 of 5 & 6 Vict. c. 100), without anything more, a piece of cloth having woven upon it a chain-work ground, with shaded and bordered six-pointed stars arranged in a quincunx:—*Held*, that, by the 21 & 22 Vict. c. 70, s. 5, this was sufficient registration of the entire pattern as the "design;" but that the whole combination only, and no single parts of it, although new, would be protected. The question of novelty and infringement is for the jury; but it is for the Court, looking at the article registered, without the aid of the jury, to say whether the registration is sufficient.
M'CREA *v.* HOLDSWORTH AND OTHERS .. .. Ex. Ch. 264

CORPORATION—*Contract not under Seal—Executed Consideration—Goods supplied for purposes of Corporation—Guardians of Poor Law Union.*] The plaintiff supplied coals from time to time to the defendants, the guardians of a poor-law union, for the use of their workhouse, under articles of agreement between the plaintiff and the defendants, executed by the plaintiff, but not under the seal of the defendants. The defendants received and used some of the coals. In an action for goods sold and delivered:—*Held*, that as the goods had been supplied and accepted by the defendants, and were such as must necessarily be from time to time supplied for the very purposes for which the defendants were incorporated, the defendants were liable to pay for the coals although the contract was not under seal. *Clarke* v. *Cuckfield Union* (21 L.J. (Q.B.) 349) followed.
NICHOLSON *v.* THE GUARDIANS OF THE BRADFIELD UNION .. 620

COSTS OF INQUIRY under Lands Clauses Consolidation Act .. 237, 342
*See* LANDS CLAUSES CONSOLIDATION ACT. 1, 2.

COUNSEL—*Authority—Withdrawal of Juror.*] It is within the general authority of counsel retained to conduct a cause to consent to the withdrawal of a juror, and the compromise being within the counsel's apparent authority is binding on the client notwithstanding he may have dissented, unless this dissent was brought to the knowledge of the opposite party at the time.
STRAUSS *v.* FRANCIS .. .. .. .. .. .. 379

COUNTY COURT, new trial in cause tried in, under 19 & 20 Vict. c. 108, s. 26 .. .. .. .. .. .. .. .. .. 427
*See* PRACTICE. 3.

COVENANT, when implied .. .. .. .. .. .. .. 173
*See* CONTRACT BY GOVERNMENT OFFICIALS.

———— to pay scheduled creditors under s. 192 of Bankruptcy Act, 1861, effect of .. .. .. .. .. .. .. .. 104
*See* BANKRUPTCY ACT, 1861. 3.

CRIMINAL LAW—*Felony—Discharge of Jury, effect of—Second Trial—Writ of Error—Witness—Admissibility of Person jointly indicted.*] The record of a conviction for felony shewed that, on the trial of the indictment, the jury being unable to agree, the judge discharged them; that the prisoner was given in charge of another jury at the next assizes, and a verdict of guilty returned, and judgment and sentence passed. On writ of error:—*Held*, affirming the judgment of the Court of Queen's Bench, that the judge had a discretion to discharge the jury, which a court of error could not review; that the discharge of the first jury without a verdict was not equivalent to an acquittal; that a second jury process might issue; and that there was no error on the record. Where two prisoners are jointly indicted for a felony and

PAGE

plead not guilty, but one only is given in charge to the jury, the other is an admissible witness, although his plea of not guilty remains on the record undisposed of.

CHARLOTTE WINSOR *v.* THE QUEEN .. .. .. .. 289

S. C. in Ex. Ch. .. .. .. .. .. .. .. 390

2. CRIMINAL LAW, master how far liable on indictment for nuisance for act of his servant .. .. .. .. .. .. .. 702
*See* NUISANCE.

CUSTOM, evidence of, of making Easter offerings .. .. .. .. 632
*See* EASTER OFFERINGS.

DAMAGES, inadequacy of .. .. .. .. .. .. .. 686
*See* LIBEL. 1.

DEBTOR AND CREDITOR—*Payment under Garnishee Order under Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 63—*Trustees under Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134), *ss.* 192 & 197.] An order under s. 63 of the Common Law Procedure Act, 1854, does not protect the garnishee and justify him in paying the amount to the judgment creditor in all events. Therefore it is no answer to an action by trustees of a deed under s. 192 of the Bankruptcy Act, 1861, for a debt due to the debtor, that the defendant, to avoid execution under a garnishee order, has paid the debt to the judgment creditor, in obedience to the order, after registration of the deed and with notice of it.

*Semble*, that the payment would have afforded no defence if made without notice.

WOOD AND OTHERS *v.* DUNN .. .. .. .. .. 77

2. ——————————: *See* BANKRUPTCY ACT, 1861.

DECK CARGO: *See* SHIP AND SHIPPING. 2.

DEED OF COMPOSITION: *See* BANKRUPTCY ACT, 1861.

DEFAMATION: *See* LIBEL. 1, 2. INTERROGATORIES. 2.

DEMAND OF POSSESSION under Lands Clauses Consolidation Act .. 529
*See* LANDS CLAUSES CONSOLIDATION ACT. 4.

DEMURRERS, right to begin on cross, on argument of petition of right 173
*See* CONTRACT BY GOVERNMENT OFFICIALS.

DEVISE, construction of .. .. .. .. .. .. 156, 570
*See* WILL. 1, 2.

DISCHARGE OF JURY upon trial for felony, effect of .. .. 289, 390
*See* CRIMINAL LAW. 1.

DISTRESS, charges for, for church-rates .. .. .. .. .. 405
*See* CHURCH-RATES.

DIVERSION OF HIGHWAY, justices may make a certificate for, when 648
*See* HIGHWAY. 3.

EASEMENT: *See* WILL. 1.

EASTER OFFERINGS—*Evidence of Custom—Terrier, construction of—Communicant—Practice on Appeal to Quarter Sessions under* 7 & 8 *Wm.* 3, *c.* 6, *s.* 7.] Terriers of the glebe lands and other rights belonging to the parish church of B., dating from 1727 to 1825, contained the following clause: "Easter Offerings. Every communicant, 2*d.*; every cow. 2*d.*; every plough, 2*d.*; every foal, 1*s.*; every hive of bees, 1*d.*; every house, 3½*d.*":—*Held*, 1. That the terriers were evidence of such a custom as excluded the common law right (if such existed) to a payment of 2*d.* for every member of a family of the age

PAGE

of sixteen as an Easter offering, because it included items to which the common law right did not extend. 2. That the word communicant did not override the whole clause, but that each item was an independent charge, and payable by every parishioner whether he came within the denomination of a communicant or not. 3. That in the absence of evidence to the contrary, "communicant" meant only those who were actually attendants at the communion. 4. That the custom attached to any house as soon as built and occupied, and was not confined to ancient houses which were in existence when the terriers were made. On the hearing of an appeal at quarter sessions, under 7 & 8 Wm. 3, c. 6, s. 7, against an order of justices under s. 2, for the payment of small tithes, oblations, &c., the respondent may adduce evidence additional to that given before the justices.

THE QUEEN, *on the prosecution of* ANDREW CASSELLS, Respondent *v.* HALL, Appellant .. .. .. .. .. 632

ECCLESIASTICAL DISTRICT, under 6 & 7 Vict. c. 37 .. .. 110
*See* LOCAL GOVERNMENT ACT, 1858.

EJECTMENT—*Title by mere Possession—Devisable Interest in Land.*] A person in possession of land without other title has a devisable interest; and the heir of his devisee can maintain ejectment against a person who has entered upon the land, and cannot shew title or possession in any one prior to the testator. W. in 1842 inclosed some waste land; in 1850 he inclosed more land adjoining, and built a cottage; he occupied the whole till 1860, when he died, having devised it to his wife, so long as she remained unmarried, with remainder to his daughter in fee. On his death, the widow and daughter continued to reside on the property, and in 1861 the defendant married the widow, and came to reside with them. Early in 1863 the daughter died, aged eighteen years, and the mother died soon after. The defendant continued to occupy the property, and in 1865 the daughter's heir-at-law brought ejectment against him:—*Held*, that the plaintiff was entitled to recover the whole property.

ASHER AND WIFE *v.* WHITLOCK .. .. .. .. .. 1

ENFRANCHISEMENT of copyhold land, effect of .. .. .. 44
*See* COPYHOLD.

ESCAPE, sheriff not liable for release of debtor from custody, when .. 502
*See* BANKRUPTCY ACT, 1861. 7.

EVIDENCE—*Ship—Register—Proof of Ownership primâ facie evidence of employment of those on board—Negligence—Master and Servant.*] A ship was laid up in a public dock for the winter, under the care of a shipkeeper; the plaintiff, being lawfully on board, suffered injury from the negligence of the persons in charge of the ship, and brought an action against the defendant. At the trial there was no evidence by whom the shipkeeper was appointed, and the only evidence to fix the defendant with liability was the ship's register, on which his name appeared as owner:—*Held* (by Blackburn and Lush, JJ.; Mellor, J., dissenting), that the register was primâ facie evidence for the jury, from which they might draw the inference that the persons in charge of the ship were employed by the defendant.

HIBBS *v.* ROSS .. .. .. .. .. .. .. 534

2. ————, admissibility of, of person jointly indicted with prisoner .. 390
*See* CRIMINAL LAW. 1.

EXCISE ACT, effect of provisions of .. .. .. .. .. 270
*See* LICENSED VICTUALLERS.

EXECUTORS, practice as to interrogatories in actions by .. .. .. 89
*See* INTERROGATORIES.

PAGE

FELLOW SERVANT, liability of master for injury caused to servant by negligence of .. .. .. .. .. .. .. .. 149
*See* NEGLIGENCE. 2.

FELONY, effect of discharge of jury on a trial for .. .. .. 289, 390
*See* CRIMINAL LAW. 1.

FISHERY: *See* SALMON FISHERY ACT, 1865.

FRANCE, law of .. .. .. .. .. .. .. .. 115
*See* SHIP AND SHIPPING. 1.

FRIENDLY SOCIETY, 21 & 22 *Vict. c.* 101, *s.* 5—*Duty of Justices to state a Case under* 20 & 21 *Vict. c.* 43.] The decision of justices under section 5 of 21 & 22 Vict. c. 101, of a dispute which had been referred to them, pursuant to one of the rules of a benefit society, is a determination of a complaint which the justices have power to determine in a summary manner within the meaning of section 2 of 20 & 21 Vict. c. 43, and the justices ought, on application by the unsuccessful party, to state a case in the manner pointed out by the latter statute.
THE QUEEN *v.* LAMBARDE AND OTHERS, JUSTICES OF KENT .. 388

2. ————————, *Proceedings against Assignee of Officer*—18 & 19 *Vict. c.* 63, *s.* 24.] An officer of a friendly society, being indebted to the society for moneys received on their behalf, resigned his office and made an assignment for the benefit of his creditors. The assignee received from the estate more than the balance due to the society, but refused to pay it over. No specific money belonging to the society was proved to have come to the hands of the assignee:—*Held*, that the assignee was not liable to be proceeded against before justices under s. 24 of the 18 & 19 Vict. c. 63.
EX PARTE O'DONNELL .. .. .. .. .. .. 274

GAME—1 & 2 *Wm.* 4, *c.* 32, *ss.* 3 & 23—*Taking Game out of season without a Certificate.*] The 1 & 2 Wm. 4, c. 32, s. 3, forbids, under penalties, the killing or taking certain game during certain intervals of the year; and section 23 imposes penalties on any person taking or killing game, or using a dog or engine for that purpose, not being authorized for want of a certificate:—*Held*, that a person using an engine for taking game without a certificate during the forbidden interval, was liable to penalties under the latter section, although he might also be liable to penalties under section 3.
SAUNDERS, Appellant; BALDY, Respondent .. .. .. 87

2. ——, right of shooting, not assessable to the poor-rate .. .. .. 359
*See* POOR-RATE. 4.

GARNISHEE ORDER, effect of payment under .. .. .. .. 77
*See* DEBTOR AND CREDITOR. 1.

GENERAL AVERAGE, effect of liability to contribute to, in determining whether ship a constructive total loss .. .. .. .. 520
*See* MARINE INSURANCE. 1.

GUARDIANS OF POOR LAW UNION, liability of, on contract not under seal .. .. .. .. .. .. .. .. .. 620
*See* CORPORATION.

HIGHWAY—*Appointment of first meeting of Highway Board*—25 & 26 *Vict. c.* 61, *s.* 10, *and* 27 & 28 *Vict. c.* 101, *s.* 10.] By the 54 Geo. 3, c. 9. s. 1, overseers of the poor are to be appointed on the 25th March, or within fourteen days after it; by the 5 & 6 Wm. 4, c. 50, s. 6, surveyors for the highways are to be appointed at the same time. By the 25 & 26 Vict. c. 61, s. 10, waywardens in every parish of a high-

PAGE

way district are to be elected in the same manner, and subject to the same regulations, as surveyors of highways were chosen or appointed before this act. By the 27 & 28 Vict. c. 101, s. 10, the first meeting of a highway board after the formation of a district under the 25 & 26 Vict. c. 61, is to be held at such time as may be appointed by the provisional or final order of justices constituting the district, "so that the time appointed be not more than seven days after the expiration of the time limited by law for the election of waywardens":—*Held*, that a final order of quarter sessions made in April, 1865 (confirming a provisional order of October, 1864), which ordered that the first meeting of the highway board to be elected for the highway district should be held on the first Thursday after the 25th of March, 1866, was good: for that the sessions were not bound to appoint a day after the expiration of the time limited by law for the election of waywardens; though, as a matter of practice, it would have been better to have postponed the day to one of the seven days after such limited time.

THE QUEEN *v.* THE JUSTICES OF THE PARTS OF LINDSEY .. 68

2. HIGHWAY—25 *& 26 Vict. c.* 61, *s.* 19—*Disputed Highway—Liability to repair admitted—Jurisdiction of Justices to order Indictment.*] Section 19 of the 25 & 26 Vict. c. 61, enacts:—"When on the hearing of any summons respecting the repair of any highway the liability to repair is denied by the waywarden on behalf of his parish, or by any party charged therewith, the justices shall direct an indictment to be preferred at the next assizes or at the next quarter sessions for the county, &c., wherein such highway is situate, against the inhabitants of the parish or the party charged therewith for suffering the said highway to be out of repair":—*Held*, that the jurisdiction of justices under this section is limited to admitted highways; and that justices have no jurisdiction to order an indictment to be preferred where it is bonâ fide denied by the parties charged that the road is a highway, and the liability to repair the road, if it is a highway, is not denied.

THE QUEEN *v.* FARRER AND ANOTHER, JUSTICES OF THE COUNTY DORSET .. .. .. .. .. .. .. 558

3. ————, *Diversion—Validity of Certificate of Justices*—5 *& 6 Wm.* 4, *c.* 50, *s.* 85.] Justices, under 5 & 6 Wm. 4, c. 50, s. 85, may make a certificate for the diversion of a highway, if the new highway is nearer *or* more commodious; and a certificate is valid which alleges one alternative. *Reg.* v. *Shiles* (1 Q. B. 919) dissented from.

The addition of fresh land to an old narrow highway, so as to widen it and make it a commodious road, is sufficient substitution of a "new highway." *Welch* v. *Nash* (8 East, 394) dissented from.

It is sufficient if the certificate state that the old highway *will be* unnecessary when the proposed alterations are completed.

THE QUEEN, *on the prosecution of* GOODALE AND OTHERS, Appellants *v.* PHILLIPS AND ANOTHER, Respondents .. .. 648

4. ————, *Exemption from Highway-rates since the Highway Act of* 1862—*Form of Poor-rate with Highway purposes.*] The township of W. separately maintains its own poor, and the hamlet of G. within the township, from time immemorial had separately maintained its own highways; H. was an occupier of land within the hamlet, the owners and occupiers of which from time immemorial had been exempt from contributing to the repairs of the highways by reason of their repairing a particular road in the hamlet; but the occupiers of the land had always been rated to the relief of the poor. The quarter sessions, under the 25 & 26 Vict. c. 61, divided the county into highway districts, and ordered, under s. 7, that "in case any township which separately maintains its own poor, is divided

PAGE

into any hamlets, &c., each of which separately maintains its own highways, such hamlets, &c., shall be combined, and such township shall be subject to the same liabilities in respect of all the highways within it which were before maintained by such hamlets, &c., as if all their several liabilities had attached to the whole township." The highway board for the division in which W. was situate, issued their precept, under s. 21, to the overseers, requiring them to pay to the treasurer a certain sum, by two instalments, towards the repairs, &c., of the highways within the township, including those in the hamlet of G., and the overseers made a rate, headed "an assessment for the relief of the poor of the township of W., and for other purposes chargeable thereon, at the rate of 1*s.* in the pound." This rate was made upon every occupier of property liable to be rated to the relief of the poor, including H.; the sum charged upon each being one sum, at the rate of 1*s.* in the pound. Of this the amount required for the payment of the first instalment under the precept was 4*d.* in the pound, and 8*d.* in the pound for the relief of the poor. H. having appealed against this rate on the ground, that, being exempt from highway-rates, he ought to have been assessed at 8*d.* only:—*Held*, that the effect of the 25 & 26 Vict. c. 61, coupled with the 5 & 6 Wm. 4, c. 50, s. 33, was not to alter the liability to highway maintenance; and that the rate ought to be amended by reducing the appellant's assessment to 8*d.* in the pound.

*Semble*, that the amount assessed for the highways should appear on the face of the rate; so that the ratepayers may see how much is for the maintenance of the poor and how much for the repair of the highways; and why one occupier, who is liable to both, is charged with the aggregate, and another, who is liable to one only, with that one.

THE QUEEN, *on the prosecution of* THE OVERSEERS OF WEAVERHAM, Respondents *v.* HEATH AND OTHERS, Appellants .. 218

5. HIGHWAY, *Liability of Parish to repair Roads in another Parish—Prescription.*] To an indictment against the inhabitants of the parish of A. for the non-repair of a highway, the defendants pleaded, that from time immemorial, the inhabitants of the parish of G., in consideration of levying and receiving rates on certain lands in the parish of A. adjoining the highway, have repaired and ought to repair the highway; to which there was a replication that the said agreement had been determined by notice. On demurrer to the replication:—*Held*, that the prosecutors were entitled to judgment: for that the consideration was insufficient to support the alleged liability of G., as neither could the consideration be enforced, nor could it be immemorial, for it must have arisen since the statutes creating the power to levy rates. That the alleged liability, therefore, amounted to no more than an arrangement between the two parishes which could be put an end to at any time.

*Quære*, whether, in point of law, a parish could be bound by prescription to repair highways in another parish.

THE QUEEN *v.* THE INHABITANTS OF THE PARISH OF ASHBY FOLVILLE .. .. .. .. .. .. .. 213

6. ————, *Turnpike-road—Application of Tolls*—12 & 13 *Vict. c.* 87, *s.* 3.] Section 3 of 12 & 13 Vict. c. 87,—which enacts that where the trustees of any turnpike-road shall *hereafter* borrow, charge, or secure any sum of money on the credit of the tolls arising on such road, they shall out of the tolls, in priority of all payments except the interest, set apart 5*l.* per cent. per annum on the sum borrowed, as a sinking fund towards repaying it,—does not apply to a case in which the trustees had borrowed a sum at 5*l.* per cent. for the purposes of their roads before the passing of the act, and after the act passed, borrowed money at 4*l.* per cent., in order to pay off the original debt.

PAGE

*Semble*, by Cockburn, C.J., and Mellor and Shee, JJ. (Blackburn, J., inclining to a contrary opinion), that the statute has no application to a case in which the object of the special act, creating the trust, is that of paving and lighting a town, as well as of forming turnpike-roads, the rates levied and tolls collected being treated as one fund, and the money borrowed on the security of the rates as well as of the tolls.

THE LOCAL BOARD OF HEALTH OF CHATHAM EXTRA, Appellants; THE ROCHESTER PAVEMENT AND ROAD COMMISSIONERS, Respondents .. .. .. .. .. 24

7. HIGHWAY—*Cattle "wandering, straying, or lying" upon the Road* —4 *Geo.* 4, *c.* 95, *s.* 75.] Horses grazing on the side of a turnpike road, with a man in charge of them, they being under his control, are not liable to be impounded under 4 Geo. 4, c. 95, s. 75, as "wandering, straying, or lying" about the road.

MORRIS, Appellant; JEFFRIES, Respondent .. .. .. 261

8. ————, *Turnpike Trust—Application of Funds—Order of Justices for contribution out of Highway-rates*—4 *&* 5 *Vict. c.* 59, *s.* 1.] By a local act, subsequent to the 4 & 5 Vict. c. 59, all the moneys coming to the hands of the trustees of a turnpike road were to be applied, first in defraying the expenses of management, not exceeding 300*l.* in any one year; secondly, in maintaining the road, the amount not to exceed 1600*l.* in any one year; and, lastly, in paying off the debt due by the trustees. The annual revenue of the trustees exceeded 1900*l.*, and the expenses of management and maintaining the road fell short of 300*l.* and 1600*l.* respectively, so that there was a small surplus applicable to the reduction of the debt; but the trustees, wishing to expend a larger sum than this surplus on the latter purpose, applied to justices, under the 4 & 5 Vict. c. 59, s. 1, to make an order upon a highway board to contribute out of the highway-rates towards the maintenance of the part of the road in their district, on the ground that the funds of the turnpike trust were not sufficient:—*Held*, that the trustees were bound to apply their funds in the order and to the extent provided by their act; and that the 4 & 5 Vict. c. 59, could not override the subsequent local act; and that the trustees were not entitled to the order they asked for. *Reg.* v. *White* distinguished.

THE WEARDALE DISTRICT HIGHWAY BOARD, Appellants; BAINBRIDGE, Respondent .. .. .. .. .. 396

9. ————, notice of appeal against shutting up .. .. .. 36
*See* INCLOSURE ACT, 1845.

———— ACT, 1862: *See* HIGHWAY. 1, 2, 4.

———— BOARD: *See* HIGHWAY. 1.

———— RATES: *See* HIGHWAY. 4, 6, 8.

HORSE, construction of warranty on sale of .. .. .. .. 463
*See* WARRANTY.

HOUSEHOLDER, what a substantial, within 43 Eliz. c. 2, s. 1 .. .. 72
*See* POOR. 3.

INCLOSURE ACT, 1845 (8 & 9 Vict. c. 118) ss. 62, 63, & 64—*Notice of Appeal against shutting up a Road.*] A valuer appointed under the Inclosure Act, 8 & 9 Vict. c. 118, s. 62, having given notice of intention to stop up a road from A. to B., a notice of appeal, under s. 63, against the stopping up of a part of the road, is good; and the quarter sessions are bound to hear the appeal.

*Quære*, whether the legal effect of the appeal, if successful, would be to leave the whole road open.

THE QUEEN *v.* THE JUSTICES OF HUNTINGDONSHIRE .. .. 36

PAGE

INCLOSURE AWARD: *See* POOR-RATE. 4.

INDICTMENT, jurisdiction of justices to order, for non-repair of highway 558
*See* HIGHWAY. 2.

————————, how far master liable to, for act of servant .. .. 702
*See* NUISANCE.

INHERITANCE, devise without words of .. .. .. .. .. 570
*See* WILL. 2.

INSURANCE: *See* LIFE INSURANCE. MARINE INSURANCE.

INTEREST, want of jurisdiction on ground of, under Railways Clauses Consolidation Act .. .. .. .. .. .. .. 84
*See* RAILWAYS CLAUSES CONSOLIDATION ACT. 1.

————————, what sufficient to disqualify a justice of the peace .. .. 230
*See* JUSTICE OF THE PEACE. 1.

INTEREST IN LAND, what is a devisable .. .. .. .. 1
*See* EJECTMENT.

INTERROGATORIES—*Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125) *s.* 51—*Action by surviving Partners or Executors—Plea, settlement with Deceased.*] To an action by surviving partners, for goods sold, money lent to, and on accounts stated with the defendant, by them and their late partner, the defendant pleaded a settlement of the account between him and the deceased by a bill not yet due. The Court, in conformity with the practice in Chancery, allowed interrogatories to be put to the defendant as to the circumstances of the alleged settlement. The Court allowed similar interrogatories in a similar action by the executors of a deceased person, in which a similar plea had been pleaded.
HAWKINS AND ANOTHER *v.* CARR. PARSONS AND ANOTHER *v.* CARR .. .. .. .. .. .. .. .. 89

2. ———————— *in Action of Slander—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 51.] In an action of slander, it being shewn that the defendant, at a certain place in the presence of certain persons, had made imputations against the plaintiff to the effect that he had committed forgery, but that the persons present refused to give the plaintiff any further particulars, the Court allowed interrogatories to be put to the defendant as to the precise words which he had used.
ATKINSON *v.* FOSBROKE .. .. .. .. .. .. 628

JUDGMENT DEBT—*Registration—Preference in the Administration of Assets*—23 & 24 *Vict. c.* 38, *s.* 3.] A judgment, signed in 1854, but not registered until after the death of the debtor, which happened after the passing of the 23 & 24 Vict. c. 38, is, by section 3, not entitled to preference in the administration of the debtor's estate.
KEMP *v.* WADDINGHAM AND ANOTHER, ADMINISTRATORS, &C. .. 355

JURISDICTION of justice under Railways Clauses Consolidation Act .. 84
*See* RAILWAYS CLAUSES CONSOLIDATION ACT. 1.

———————— of Secretary of State to form fishery districts .. .. 469
*See* SALMON FISHERY ACT, 1865.

———————— of superior courts where ousted by special provisions of a statute .. .. .. .. .. .. .. .. .. 711
SEE NEGLIGENCE. 1.

———————— of justices to order indictment for non-repair of highway 559
*See* HIGHWAY. 2.

PAGE

JUROR, authority of counsel to consent to withdrawal of .. .. .. 379
*See* COUNSEL.

JURY, effect of discharge of, on trial for felony .. .. .. 289, 390
*See* CRIMINAL LAW. 1.

JUSTICE OF THE PEACE—*Disqualifying Interest—Possibility of Bias.*] Though any pecuniary interest, however small, in the subject-matter disqualifies a justice from acting in a judicial inquiry, the mere possibility of bias in favour of one of the parties does not ipso facto avoid the justice's decision; in order to have that effect the bias must be shewn at least to be real. The corporation of B. were the owners of waterworks, and were empowered by statute to take the water of certain streams, without permission of the mill-owners, on obtaining a certificate of justices that a certain reservoir was completed, of a given capacity, and filled with water. An application was made to justices accordingly, which was opposed by the mill-owners; but after due inquiry the justices granted the certificate. Two of the justices were trustees of a hospital and friendly society respectively, each of which had lent money to the corporation on bonds charging the corporate fund. Neither of the justices could by any possibility have any pecuniary interest in these bonds; but the security of their cestui qui trusts would be improved by anything improving the borough fund, and the granting of the certificate would indirectly produce that effect, as increasing the value of the waterworks. There was no ground to doubt that the justices had acted bonâ fide:—*Held*, that the justices were not disqualified from acting in the granting of the certificate, and the Court refused a certiorari for the purpose of quashing it.
THE QUEEN *v.* RAND AND OTHERS .. .. .. .. 230

2. ———, meaning of, in Railways Clauses Consolidation Act .. .. 84
*See* RAILWAYS CLAUSES CONSOLIDATION ACT. 1.

3. ———, duty of, to state a case under 20 & 21 Vict. c. 43 .. .. 388
*See* FRIENDLY SOCIETY. 1.

4. ———, order of, for contribution out of highway-rates .. .. .. 396
*See* HIGHWAY. 8.

5. ———, jurisdiction of, to order indictment for non-repair of highway .. 558
*See* HIGHWAY. 2.

6. ———, validity of certificate of, under 5 & 6 Wm. 4, c. 50, s. 85 .. 648
*See* HIGHWAY. 3.

LAND, what is a devisable interest in .. .. .. .. .. 1
*See* EJECTMENT.

———, sale of superfluous, by railway, under Lands Clauses Consolidation Act 510
*See* LANDS CLAUSES CONSOLIDATION ACT. 3.

LANDLORD AND TENANT, construction of lease .. .. .. 38
*See* POOR. 2.

———————————, where tenant servant of landlord and occupies premises without paying rent, when eligible to office of overseer of the poor .. .. .. .. .. .. .. 72
*See* POOR. 3.

LANDS CLAUSES CONSOLIDATION ACT, 1845 (8 *Vict. c.* 18), *ss.* 51 *&* 68—*Lands injuriously affected—Compensation—Amount offered—Costs.*] An offer of compensation, in respect of lands injuriously affected by the execution of works within section 68 of the Lands Clauses Consolidation Act, 1845, must be an unconditional offer of compensation for the injury done, and is bad if it be an offer of one sum for compensation and costs. Where, therefore, an offer

PAGE

was made of 100*l.* in full satisfaction of all injury sustained, and for all costs and charges incidental to the claim, and on the inquiry the jury found the amount of injury to be 75*l.*:—*Held*, that the offer was bad, and that the claimant was entitled to his costs under section 51, notwithstanding the amount of the verdict was for a sum less than the offer.

*Quære*, whether a sum offered as compensation under section 68, after the costs of nominating a special jury have been incurred, and before a notice of the inquiry is given under section 46, is "a sum previously offered," within section 51.

In the Matter of Balls *v.* The Metropolitan Board of Works .. .. .. .. .. .. .. .. 337

2. LANDS CLAUSES CONSOLIDATION ACT, 1845 (8 *Vict. c.* 18), *ss.* 51, 94—*Severed Land—Communication—Costs of Inquiry under section* 94—*Railway Company.*] A piece of land being severed by a railway from other land of the same owner, he required the company to make him a communication between the two, on which the company required him, under section 94 of the Lands Clauses Consolidation Act, 1845, to sell them the severed land as being of less value than the expense of making the communication. An inquiry then took place before a jury pursuant to that section, which enacts that "any dispute as to the value of the severed land, or as to what would be the cost of making the communication, shall be ascertained as in the act provided for cases of disputed compensation." The jury found the land of less value than the cost of the communication. The company had made no offer for the land previous to the inquiry; and the landowner claimed his costs under section 51:—*Held*, that section 51 was not incorporated with section 94, and that the landowner was not entitled to his costs of the inquiry.

In the Matter of Cobb *v.* The Mid-Wales Railway Company .. .. .. .. .. .. .. 342

3. ——————————, *s.* 127—*Railway—Superfluous Lands —Vested Interest not divested by subsequent Statute.*] By provisions in a railway act (similar to section 127 of the Lands Clauses Consolidation Act, 1845), lands acquired by the company under the act, but not required for the purposes of the act, were to be sold within ten years of the passing of the act; and superfluous lands remaining unsold at the expiration of the time limited, were "thereupon to vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same":—*Held*, 1, that this extended to lands the reversion of which had been acquired by the company subject to a term. 2. That, where there are several adjoining properties in contact with the superfluous land, it is to be divided among the owners of the adjoining properties in proportion to the frontage of each: meaning by frontage what would be the length of the line of contact of each property if the line were made straight from the point of intersection of the boundaries on one side to the point of intersection of the boundaries on the other side. By a subsequent act obtained by the same company, the periods limited by the several acts relating to the company for the sale of their superfluous lands were extended to five years from the passing of the last act, and the several acts were to be read as if that period had been fixed by each of those acts:—*Held*, that this enactment did not defeat a right to unsold superfluous land already vested under a former act at the time of the passing of the last act.

Moody *v.* Corbett and Others and The London, Brighton, and South Coast Railway Company .. Ex. Ch. 510

PAGE

4. LANDS CLAUSES CONSOLIDATION ACT, 1845 (8 *Vict. c.* 27), *ss.* 18, 121—*Compensation—Tenant from Year to Year—Demand of Possession—Notice to Treat—Railway Company.*] Section 121 of the Lands Clauses Consolidation Act enacts, "If any lands (authorized to be taken) shall be in the possession of any person having no greater interest than as tenant for a year or from year to year, and if he be required to give up possession of any of the lands before the expiration of his term or interest, he shall be entitled to compensation for the value of his unexpired term or interest":—*Held*, that the section applies only to cases where the tenant has been required to give up possession of his land; and that a notice to treat, under section 18, is not equivalent to requiring possession.
THE QUEEN *v.* STONE .. .. .. .. .. .. 529

5. ———————, recovery of compensation under .. 130
*See* RAILWAY COMPANY. 3.

LAW OF FRANCE: *See* SHIP AND SHIPPING. 1.

LEASE, construction of .. .. .. .. .. .. .. 38
*See* POOR. 2.

LEVEL CROSSING, negligence of railway in keeping .. .. .. 277
*See* NEGLIGENCE. 3.

LIBEL—*Inadequacy of Damages.*] The plaintiff brought an action against the defendant for having published in a Liverpool newspaper, of which the defendant was proprietor, a series of libels, of a gross and offensive character, on the plaintiff as the incumbent of a church in Liverpool. It appeared at the trial that the first libel originated in the plaintiff having preached and published in the local papers two sermons, reflecting on the magistrates for having appointed a Roman Catholic chaplain to the borough gaol, and on the town council for having elected a Jew their mayor; and the plaintiff had, soon after the libels had commenced, alluded, in a letter to another newspaper, to the defendant's paper as the "dregs of provincial journalism;" and he had also delivered from the pulpit and published a statement, to the effect that some of his opponents had been guilty of subornation of perjury in relation to a charge of assault for which the plaintiff had been fined 5*s*. The jury having returned a verdict for a farthing damages, the plaintiff obtained a rule for a new trial on the ground of the inadequacy of the damages:—*Held*, that, although on account of the grossness and repetition of the libels, the verdict, in the opinion of the Court, might well have been for larger damages, it was a question for the jury, taking the plaintiff's own conduct into consideration, what amount of damages he was entitled to; and that the Court ought not to interfere. (By Blackburn and Mellor, JJ.; Shee, J., dissenting.)
KELLY *v.* SHERLOCK .. .. .. .. .. .. 686

2. ———, *Matter of Public Interest—Dispute between Incumbent and Churchwarden as to use of Church.*] A churchwarden having written to the plaintiff, the incumbent, accusing him of having desecrated the church, by allowing books to be sold in it during service, and by turning the vestry-room into a cooking apartment, the correspondence was published without the plaintiff's permission in the defendant's newspaper, with comments on the plaintiff's conduct:—*Held*, that this was a matter of public interest, which might be made the subject of public discussion; and that the publication was, therefore, not libellous, unless the language used was stronger than, in the opinion of the jury, the occasion justified.
KELLY *v.* TINLING .. .. .. .. .. .. .. 699

PAGE

LICENSED VICTUALLERS—*Beer Act* (35 *Geo.* 3, *c.* 113), *s.* 1—*Excise Act* (6 *Geo.* 4, *c.* 81), *s.* 11.] The Excise Act, 6 Geo. 4, c. 81, s. 11,—which enacts that nothing herein contained shall extend to prohibit any person duly licensed to sell beer, cider, or perry, by retail, to carry on his trade, for which he is licensed, in booths or other places, at the time and place and within the limits of any lawful fair or any public races,—does not dispense with the necessity of a magistrate's licence, and any person selling beer at a race without such licence, is liable to the penalty imposed by 35 Geo. 3, c. 113, s. 1.

*Quære*, whether a regatta is a race within the meaning of the above 11th section.

ASH, Appellant; LYNN, Respondent .. .. .. .. 270

LIFE INSURANCE, practice in pleading to declaration on .. .. 35
*See* PRACTICE. 1.

LOCAL BOARD OF HEALTH—*Municipal Corporation—Transfer of Powers of one to the other—"Trustees for executing Act for Paving," &c.*—20 *&* 21 *Vict. c.* 50, *s.* 2.] By a provisional order of the General Board of Health, confirmed by 14 & 15 Vict. c. 98, a local board of health was constituted, under 11 & 12 Vict. c. 63, for the parish of St. John, Margate, comprising the town of Margate and a rural district; by the order the rating powers of the board were in the first instance confined to an area conterminous with the town, but power was given to the board from time to time to extend this area, and the members of the board were to be elected by the ratepayers within the rating area for the time being; and the board were made commissioners for executing certain local acts in the town. Afterwards the town of Margate, consisting of the then rating area, was made a municipal corporation by charter. The local board then purported by indenture, under 20 & 21 Vict. c. 50, s. 2, to transfer their powers to the new corporation; and the corporation, as exercising those powers, made an order extending the rating area to the rest of the parish of St. John, and a general district rate was accordingly made on all the rateable property in the parish, as well without as within the town:—*Held*, that the corporation had no power to make the order and rate in question: for the transfer by the local board to the corporation was invalid, inasmuch as the local board were not trustees for executing an act for paving, lighting, &c., within the meaning of 20 & 21 Vict. c. 50, s. 2.

SWINFORD *v.* KEBLE .. .. .. .. .. .. 549

2. ——————————, duty of, to cleanse ditches .. .. 328
*See* PUBLIC HEALTH ACT, 1848. 1.

3. ——————————, election of .. .. .. .. 433
*See* QUO WARRANTO.

LOCAL GOVERNMENT ACT, 1858 (21 *&* 22 *Vict. c.* 98), *ss.* 12, 13, 14, 16—*Adoption of the Act—"Place having defined Boundary"—Ecclesiastical District under* 6 *&* 7 *Vict. c.* 37.] A district formed for ecclesiastical purposes, under the 6 & 7 Vict. c. 37, consisting of parts of two townships, each of which townships separately maintains its own poor and its own highways, is "a place having a known and defined boundary" within the meaning of section 12 of the Local Government Act, 1858, and is not a less place included within a greater within the meaning of section 14. Preliminary proceedings under ss. 14 and 16 are therefore unnecessary, and the district may at once adopt the act, at a meeting of owners and ratepayers, convened by the churchwardens; and an order of the Secretary of State confirming such adoption is valid.

THE QUEEN *v.* THE RATEPAYERS OF NORTHOWRAM AND CLAYTON 110

PAGE

LOSS, what amounts to a constructive total .. .. .. .. 520
*See* MARINE INSURANCE. 1.

LUNATIC PAUPER, settlement of .. .. .. .. .. 385
*See* POOR. 5.

MANDAMUS, power of Court to grant, ordering rate to be made .. 63
*See* PUBLIC HEALTH ACT, 1848. 2.

MANOR, effect of grant of part of waste of .. .. .. .. .. 44
*See* COPYHOLD.

MARINE INSURANCE—*Ship—Constructive total Loss—Cost of raising Ship and Cargo—General Average.*] A ship was submerged in deep water with heavy cargo on board; there was a common peril of destruction imminent over ship and cargo as they lay submerged; the most convenient mode of saving ship or cargo or both was by raising the ship together with the cargo; the cost of the raising would be an extraordinary expense for the common benefit of both, and the cargo would be liable to general average contribution, and the shipowner would have a lien on the cargo to secure payment of that general average. The ship being insured:—*Held*, that in determining whether or not the ship was a constructive total loss, the amount of general average which would be contributed by the cargo must be taken into account, and the cost of raising the ship calculated as reduced by that amount.
KEMP *v.* HALLIDAY .. .. .. .. Ex. Ch. 520

2. ———————, The fact of a ship having sailed without a certificate from a clearing officer, under ss. 170, 171, and 172, of 16 & 17 Vict. c. 107, does not necessarily render her unseaworthy at the commencement of the voyage .. .. .. .. .. .. 162
*See* SHIP AND SHIPPING. 2.

MASTER AND SERVANT—*Absenting from Service—Lawful Excuse* (4 *Geo.* 4, *c.* 34, *s.* 3)—*Second Offence.*] A workman entered into a contract with a master to serve him for a term of two years; he absented himself during the continuance of the contract from his master's service, and, under 4 Geo. 4, c. 34, s. 3, he was summoned before justices, convicted, and committed. After the imprisonment had expired, and while the term still continued, he refused to return to his master's service, and was again summoned before justices, when he stated that he considered his contract determined by the commitment; the justices found that he bonâ fide believed that he could not be compelled to return to his employment, and dismissed the summons:—*Held*, that although the servant had not returned to the service, yet, as the contract continued, he had been guilty of a fresh offence, for which, notwithstanding his conviction and imprisonment, he could be again convicted; and that his bonâ fide belief that he could not be compelled to return to his employment did not constitute a lawful excuse for his absence.
UNWIN AND OTHERS, Appellants; CLARKE, Respondent .. 417

2. ———————, Servant occupying premises of his master without paying rent, when eligible to the office of overseer of the poor 72
*See* POOR. 3.

3. ———————, Liability of master for injury to servant from negligence of fellow-servant .. .. .. .. .. 149
*See* NEGLIGENCE. 2.

4. ———————, Master, how far liable for act of servant on indictment for nuisance .. .. .. .. .. .. .. 702
*See* NUISANCE.

PAGE

5. MASTER AND SERVANT, Liability of commissioners for public purposes for the acts of their servants .. .. .. .. .. 711
*See* NEGLIGENCE. 1.

METROPOLIS MANAGEMENT ACTS, 18 & 19 *Vict. c.* 120, *s.* 105; 25 & 26 *Vict. c.* 102, *ss.* 77, 112—*Paving of new Street—Apportionment of Expenses.*] A board of works, under the Metropolitan Management Acts, passed a resolution that a certain road should be repaired, and instructed the surveyor to estimate the cost and apportion it on the owners of property through which the road passed. The surveyor divided the road into four sections, and apportioned the cost of repairing each section amongst the owners of property in each section respectively. These apportionments were confirmed by resolutions of the board:—*Held*, that although the board might, under s. 105 of 18 & 19 Vict. c. 120, and ss. 77 and 112 of 25 & 26 Vict. c. 102, have resolved that part of the road should be repaired, yet, as they had resolved that the whole road should be repaired, there ought to have been but one apportionment on all the owners along the entire road; and that the separate apportionments were invalid, and could not be enforced.
WHITCHURCH, Appellant; THE BOARD OF WORKS FOR THE FULHAM DISTRICT, Respondents .. .. .. .. 233

METROPOLITAN POLICE ACTS, 2 & 3 *Vict. c.* 47, *s.* 66; 2 & 3 *Vict. c.* 71, *s.* 24—"*Having or conveying*" *Property suspected of being stolen—Offender* "*brought before a Magistrate*"—*Practice—R. G. Hil. T.* 1862—*Division of Appendix to Special Case into Paragraphs.*] Section 24 of 2 & 3 Vict. c. 71,—which enacts that every person who shall be brought before a metropolitan magistrate charged with having in his possession or conveying in any manner anything which may be reasonably suspected of being stolen or unlawfully obtained, and who shall not give an account to the satisfaction of the magistrate of how he came by the same, shall be guilty of a misdemeanour,—is supplemental only to s. 66 of 2 & 3 Vict. c. 47, which empowers a constable to stop, search, and detain any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully detained; and the sections apply only to possession in the streets, and not to possession in a house.
*Semble*, that in a case in which a constable would have been authorized to arrest, the magistrate would have jurisdiction, although the offender had not been arrested, but was "brought before" him by summons. Evidence and documents, set out at length in an appendix to a special case, should be numbered in paragraphs, pursuant to R. G. Hil. T. 1862, or the costs will not be allowed.
HADLEY AND OTHERS, Appellants; PERKS AND ANOTHER, Respondents .. .. .. .. .. .. 444

MUNICIPAL CORPORATION, transfer of powers of board of health to 549
*See* LOCAL BOARD OF HEALTH.

NEGLIGENCE—*Action—Liability of Commissioners for a public purpose—Master and Servant—Compensation or Action—Jurisdiction of Superior Courts, where ousted.*] By an act of parliament, drainage commissioners were to make and maintain a cut and sluice; the sluice burst, owing to the negligence of the servants of the commissioners, and damage having ensued to the plaintiff's land, he brought an action against the commissioners, in the name of their clerk:—*Held* (overruling the judgment of the Queen's Bench), on the authority of the *Mersey Docks* cases (Law Rep. 1 H. L. 93), that the commissioners were not exempt from liability by reason of their being commis-

PAGE

sioners for a public purpose; and that the duty being imposed upon them of maintaining the sluice, they were liable for the damage caused by the negligent performance of that duty by their servants.

By a section of the statute, if any person, after the commissioners or any person employed or authorized by them shall have begun to carry the statute into execution, shall sustain damage or injury in his lands or chattels by or in consequence of any act of the commissioners, their agents, workmen, or servants, the damage or injury shall be ascertained by a jury before the sheriff:—*Held*, that the section applied only to damage resulting from acts authorized by the statute; but, assuming it to extend to unauthorized acts, on a review of the statute, and inasmuch as the cause of action was for an omission or nonfeasance, it was not the subject of compensation within the section.

*Quære*, whether the section would exclude the jurisdiction of the superior courts in cases to which it applies: *Semble*, that it would.

COE *v.* WISE .. .. .. .. .. Ex. Ch. 711

2. NEGLIGENCE—*Master and Servant—Fellow-servant—Common employment.*] The rule which exempts a master from liability to a servant for injury caused by the negligence of a fellow-servant, applies in cases where, although the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which have to be considered in his wages. Thus, whenever an employment in the service of a railway company is such as necessarily to bring the person accepting it into contact with the traffic of the line, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to such employment, and within the rule. The plaintiff was in the employment of a railway company as a carpenter, to do any carpenter's work for the general purposes of the company. He was standing on a scaffolding at work on a shed close to the line of railway, and some porters in the service of the company carelessly shifted an engine on a turn-table, so that it struck a ladder supporting the scaffold, by which means the plaintiff was thrown down and injured:—*Held*, on the above principle, that the company were not liable.

MORGAN *v.* THE VALE OF NEATH RAILWAY COMPANY Ex. Ch. 149

3. ————, *Railway Company—Level Crsosing—Railways Clauses Consolidation Act*, 1845 (8 *Vict. c.* 20), *s.* 47.] The defendants' line of railway was crossed by a public carriage road diagonally on a level; and there was also at the same spot, crossing the railway nearly at right angles, a private way leading to C.'s storeyard. There was a gate on C.'s side of the railway opening into his yard, which was a private gate under C.'s control; but nearly immediately opposite, on the other side of the railway, there was one gate across both the private way and the public carriage road, and this gate was under the control of the defendants, there being a gatekeeper stationed there by them, pursuant to s. 47 of the Railways Clauses Consolidation Act. Any one going with a carriage, &c., to C.'s yard passed through this gate across the railway and in at the private gate opposite, and vice versâ on leaving the yard. The plaintiff's carman with his cart and horses having unloaded in C.'s yard one evening after dark, was about to leave, and having opened C.'s gate, the gate opposite being nearly closed, hailed the defendants' gatekeeper on the opposite side of the railway to know if the line was clear, and he answered, "Yes; come on." The cart and horses accordingly proceeded, and were run into

PAGE

by a train:—*Held*, that though s. 47 in terms imposed the duty on a railway company of merely keeping "the gates closed across a public carriage road, except when carriages, &c., shall have to cross the railway," yet the duty was implied of using proper caution in opening them; that, whatever might have been the consequence had the way which the plaintiff's carman was using been simply the private way, as he could not get across the railway without passing through the public gate, it was the gatekeeper's duty to open or refuse to open it for him; that what the gatekeeper said was equivalent to opening the gate, and he therefore was guilty of negligence in connection with his duty, for which the defendants were liable.
LUNT *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY .. .. .. .. .. .. .. .. 277

4. NEGLIGENCE of keepers of ship .. .. .. .. .. 534
*See* EVIDENCE. 1.

5. ————————: *See* NUISANCE.

NEW TRIAL in cause tried in county court, under 19 & 20 Vict. c. 108, s. 26 .. .. .. .. .. .. .. .. .. 427
*See* PRACTICE. 3.

NOTICE OF APPEAL against shutting up a road .. .. .. 36
*See* INCLOSURE ACT, 1845.

———— TO TREAT under Lands Clauses Consolidation Act .. .. 529
*See* LANDS CLAUSES CONSOLIDATION ACT. 4.

NUISANCE—*Master and Servant—Negligence—Master liable on Indictment for act of Servant.*] The owner of works, carried on for his profit by his agents, is liable to be indicted for a public nuisance caused by acts of his workmen in carrying on the works, though done by them without his knowledge and contrary to his general orders.
THE QUEEN *v.* STEPHENS .. .. .. .. .. .. 702

OFFERINGS, evidence of custom of Easter .. .. .. .. 632
*See* EASTER OFFERINGS.

OVERSEER OF THE POOR, qualification of .. .. .. .. 72
*See* POOR. 3.

OWNERSHIP of ship, how far register is primâ facie evidence of .. 534
*See* EVIDENCE. 1.

PARISH, liability of, to repair roads in another .. .. .. .. 213
*See* HIGHWAY. 5.

PAROCHIAL ASSESSMENT ACT (6 & 7 Wm. 4. c. 96), s. 1, what deductions may be made from gross rental under .. .. .. 18
*See* POOR-RATE. 2.

PARTICULARS OF PLEA, when order made to deliver .. .. 35
*See* PRACTICE. 1.

PARTNER, action by surviving, practice as to interrogatories in .. .. 89
*See* INTERROGATORIES. 1.

PARTNERSHIP DEBT: *See* BANKRUPTCY ACT, 1861. 4.

PARTY to indenture by description .. .. .. .. .. 412
*See* BANKRUPTCY ACT, 1861. 6.

PAUPER, settlement of lunatic .. .. .. .. .. .. 385
*See* POOR. 5.

PAGE

PAVING STREETS under Metropolis Management Act .. .. .. 233
*See* METROPOLIS MANAGEMENT ACTS.

PAWN—*Bailment of Pawn or Pledge—Interest under original Pledge not determined by Repledge—Detinue.*] A. deposited debentures with B. as a security for the payment, at maturity, of a bill endorsed by A. and discounted by B., on the agreement that B. should have power to sell or otherwise dispose of the debentures if the bill should not be paid when due; *before* the maturity of the bill, B. deposited the debentures with C., to be kept by him as a security until the repayment of a loan from C. to B. *larger* than the amount of the bill. The bill was dishonoured, and while it still remained unpaid, A. brought detinue against C. for the debentures:—*Held* (by Cockburn, C.J., Blackburn and Mellor, JJ.; Shee, J., dissenting), that the repledge by B. to C. did not put an end to the contract of pledge between A. and B., and B.'s interest and right of detainer under it; and that A., therefore, could not maintain detinue without having paid or tendered the amount of the bill.
DONALD *v.* SUCKLING .. .. .. .. .. .. 585

PAYMENT, under garnishee order, effect of .. .. .. .. 77
*See* DEBTOR AND CREDITOR. 1.

PENALTY, liability of bailiff to, on making distress for church-rates .. 405
*See* CHURCH-RATES.

PETITION OF RIGHT, when not maintainable .. .. .. .. 173
*See* CONTRACT BY GOVERNMENT OFFICIALS.

PLEA, when order made by delivery of particulars of .. .. .. 35
*See* PRACTICE. 1.

——— of settlement of accounts, interrogatories allowed as to circumstances of, when .. .. .. .. .. .. .. .. 89
*See* INTERROGATORIES. 1.

PLEADING: *See* PRACTICE.

PLEDGE, power to repledge .. .. .. .. .. .. 585
*See* PAWN.

POLICE ACTS: *See* METROPOLITAN POLICE ACTS.

POOR—*Irremovability—Break of Residence—9 & 10 Vict. c. 66, s. 1.*] A woman, having resided for sixteen years in the parish of S., was obliged through poverty to sell her furniture and give up her lodgings; and being destitute, she slept for one night on doorsteps in the same parish, and after that, for twenty-one successive nights in a refuge for the houseless poor in an adjoining parish; during the daytime she wandered about, chiefly in the parish of S. She then applied to be admitted into the workhouse of S.; but being refused, she slept for two nights in the parish, and after that was received into the workhouse, and an order for her removal applied for:—*Held*, that the pauper had not ceased to reside in the parish of S., and was therefore irremovable.
THE QUEEN, *on the prosecution of* THE OVERSEERS OF SAINT DIONIS BACKCHURCH, Appellants *v.* THE INHABITANTS OF SAINT LEONARD, SHOREDITCH, Respondents .. .. .. 21

2. ———, *Settlement by renting a Tenement under 6 Geo. 4, c. 57—Lease, construction of.*] H. occupied a house for years under the following agreement: W. agrees to let, and H. agrees to hire the house, No. 62, George Street, quarterly, at a yearly rent of 25*l.* to be paid on the usual four quarter-days, a quarter's notice to be given by either party:—*Held*, that it was at the option of either party to have determined the tenancy before the end of the first year; but that, on the

PAGE

authority of previous cases, inasmuch as the tenancy amounted to a tenancy for a year defeasible by notice, and had, in fact, endured more than a year, H. had gained a settlement by renting a tenement for a whole year within the meaning of the 6 Geo. 4, c. 57.

THE GUARDIANS OF THE HASTINGS UNION, Appellants; THE GUARDIANS OF SAINT JAMES, CLERKENWELL, Respondents .. 38

3. POOR—*Overseers*—43 *Eliz. c.* 2, *s.* 1—"*Substantial Householder*"—*Master and Servant—Landlord and Tenant.*] Where a servant occupies premises of his master, without paying rent, as part remuneration for his services, in order to ascertain whether the servant is a "substantial householder" within the 43 Eliz. c. 2, s. 1, so as to be eligible to the office of overseer of the poor, the question is whether the occupation is subservient and necessary to the service; if it is, the occupation is that of the master; if it is not, the occupation is that of a tenant, and the servant is a "householder."

THE QUEEN, *on the prosecution of* ASTLEY AND ANOTHER, Respondents *v.* SPURRELL AND WALKER, Appellants .. 72

4. ———, *Irremovability—Break of Residence.*] A single woman, aged 32, in January, 1861, had resided in the township of G. for more than three years; she was then residing with her widowed mother, and continued with her until the month of September, when she went to live out of G. as a domestic servant, on the terms of remaining a month upon trial, and if she remained longer, on the usual terms of a month's warning; at the time she left she intended to return to her mother's house if she received notice to leave within the month; her mistress gave her notice, and she returned to her mother's house in G. at the end of the month, where she remained till February, 1864:—*Held*, that she had not become irremovable from G., as her absence for a month was a break of residence, her intention to return being immaterial as she had no residence of her own to return to.

THE QUEEN, *on the prosecution of* THE GUARDIANS OF THE HAYFIELD UNION, Appellants *v.* THE GUARDIANS OF THE GLOSSOP UNION, Respondents .. .. .. .. .. .. 227

5. ———, *Lunatic Pauper—Order of Settlement—Union within several Jurisdictions—Appeal to what Sessions*—16 *&* 17 *Vict. c.* 97, *s.* 108.] By s. 108 of 16 & 17 Vict. c. 97, any union or parish may appeal against any order, adjudging the settlement of any lunatic confined in an asylum, to the quarter sessions for the county in which the union or parish obtaining the order is situate, or if the parish or union extend into several jurisdictions, then to the quarter sessions of the county or borough in which the asylum is situate. An order, under s. 97, adjudging the settlement of a pauper lunatic confined in an asylum, was obtained by a union, consisting of parishes partly in a borough, which was wholly in one county but had separate quarter sessions, and partly of parishes in the county at large:—*Held*, that the appeal against the order, under s. 108, was to the quarter sessions of the county, and not to those of the borough in which the asylum was situate.

THE QUEEN *v.* THE JUSTICES OF KENT .. .. .. .. 385

POOR-RATE—*Rateable Value—Deduction for Rates—Landlord compounding.*] Under a local act, the owner of a tenement under 6*l.* 10*s.* rateable value, ascertained according to the Parochial Assessment Act, is rated, instead of the occupiers, to the poor and other parochial rates; and, if he chooses, he may compound to pay whether the tenement be occupied or not; and if he so compounds, he is to pay only one-half the rate:—*Held*, that an owner so compounding is entitled, in ascertaining the rateable value of the tenement, to the full deduc-

PAGE

tion in respect of rates as if the tenement had not been compounded for.

THE QUEEN, *on the prosecution of* THE OVERSEERS OF BILSTON, Respondents *v.* DODD AND ANOTHER, Appellants .. . . 16

2. POOR-RATE—*Assessable Value—Deductions under Parochial Assessment Act* (6 & 7 *Wm.* 4, *c.* 96), *s.* 1—*Voluntary Water-rate.*] On a case stated by quarter sessions, the gross rental of a house was found to be a certain sum:—*Held*, that in ascertaining the rateable value to the poor-rate, a deduction from this gross rental ought not to be allowed in respect of a payment made by the landlord for water laid on and supplied to the house by public commissioners, such supply and payment being optional.

THE QUEEN, *on the prosecution of* ISAAC HUGHES, Appellant *v.* THE OVERSEERS OF BILSTON, Respondents .. .. .. 18

3. ———————, *Rating of Gasworks—Deductions for Machinery, &c., fixed to the Freehold—Purchase by Tenant of the Machinery*—6 & 7 *Wm.* 4, *c.* 96, *s.* 1.] On assessing gasworks to the poor-rate, in ascertaining the gross estimated rental a deduction ought to be allowed in respect of the cost of the *meters*, which belong to the gas company, but are put up on the premises of the consumers, and are connected with the service-pipes by solder, and by means of those pipes with the company's mains: as they are mere chattels. But deductions ought not to be allowed in respect of—1. *Retorts*, which are instruments in which the coals are carbonized and the gas produced, consisting of circular pieces of clay, to which the heat is applied, and also the arches which contain them, and the pipes through which the gas passes to the purifiers, the whole being distinct and severable from the floor, and not attached to it by cement or mortar, but only packed with fire-clay. 2. *Purifiers*, which are massive iron vessels, standing on a brick base, but not fixed to it, connected with the pipes passing through the soil to the retorts by screw-bolts, and in the same way with the pipes passing through the soil to the tanks and gasholders. 3. *Steam-engines*, used for driving the machinery, fastened by screw-bolts to a stone base fixed in the soil. 4. *Boilers*, set in brickwork, fixed in the soil. 5. *Gasholders*, which are hollow cylindrical vessels of plate-iron, covered at the top, but open at the bottom, and rising and falling by means of pillars and pulleys into circular tanks sunk in the soil, into which the gas passes through the purifiers from the retorts. 6. *Trade-fixtures*, such as pumps and exhausters, which are fixed to the freehold, but would be removable as tenant's fixtures. For all of these are things which, though capable of being removed, are yet so far attached as that it was intended that they should remain permanently connected with the freehold; viz. the gasworks, and remain permanent appendages to them, as essential for the purpose for which the works were made. And it makes no difference that, by the practice in letting gasworks, the tenant would be compelled to take to and find capital for the purchase of all the above property.

THE QUEEN, *on the prosecution of* THE PHŒNIX GAS LIGHT AND COKE COMPANY, Appellants *v.* THE INHABITANTS OF THE PARISH OF LEE, Respondents .. .. .. .. .. 241

4. ———————, *Valuation List—Game, Reservation of right to—Inclosure Award, construction of—Conversion of Waste into stinted Pasture—Severance of right of shooting from soil*—8 & 9 *Vict. c.* 118, *s.* 116.] A manor, with all the wastes and rights of sporting, &c., was conveyed to trustees in trust for the owners of ancient tenements within the manor. By an award confirmed by an inclosure act, the waste of the manor was converted into a stinted pasture, a certain

PAGE

number of stints was allotted to the trustees as lords in trust of the manor, and a proportionate number to each freeholder, ancient or otherwise. The award contained a clause "that the right and interest in all mines under the lands to be inclosed, also the right to all manner of game upon the said lands, be not in any way affected or interfered with by this inclosure; and that all persons entitled to such mines and game have the same right of entry and other rights as heretofore used and enjoyed":—*Held*, that the effect of the award, coupled with the 8 & 9 Vict. c. 118, s. 116, was to pass the soil in the stints to the lords in trust and the freeholders as tenants in common, and to leave the right of shooting in the lords, so that the right was severed from the soil, and became an incorporeal right in gross; and as such, was neither itself assessable to the poor-rate, nor to be taken into account as enhancing the value of the stints. And that the fact that some of the stint-holders who were entitled to the benefit of the trust occupied their own lands and stints made no difference; as the benefit from the trust could not be connected with their occupation so as to enhance the rateable value of it.

THE OVERSEERS OF THE TOWNSHIPS OF HILTON AND WALKERFIELD, Appellants; THE OVERSEERS OF THE TOWNSHIP OF BOWES AND OTHERS, Respondents .. .. .. .. 359

5. POOR-RATE—*Railway—Contributive Value—Allowance for Depreciation of Rolling Stock*—6 & 7 *Wm.* 4, *c.* 96, *s.* 1.] In assessing to the poor-rate a part of a railway in a particular parish, H., the rateable value is to be ascertained by taking the gross earnings in the parish, and making the usual deductions for working expenses, &c., applicable to that part of the railway; and the fact that, owing to the increased traffic the working expenses of the railway in other parishes, over which the traffic passing through H. passes, bear a less ratio to the earnings, is not to be taken into account as lessening the average expenses over the whole transit, and so contributing to enhance the rateable value of the railway in the particular parish. On appeal against the rating of a railway, an arbitrator (substituted for the quarter sessions) allowed for depreciation in the rolling stock an average sum calculated on the number of years the stock would last, subject to the opinion of the Queen's Bench. The railway company contended, as a matter of law, that the allowance ought to have been the difference between the value of the stock at the beginning of the year and what a new tenant would give at the end of the year. The Court refused to interfere, holding that it was a question of fact for the sessions, in what way it might reasonably be expected that the hypothetical tenant from year to year, in considering what rent he could afford to give, would calculate the depreciation, taking into account the surrounding circumstances, and amongst others, the probability of his tenancy continuing for more than the year.

THE GREAT EASTERN RAILWAY COMPANY, Appellants; THE OVERSEERS OF HAUGHLEY, Respondents .. .. .. 666

POSSESSION, title by .. .. .. .. .. .. .. 1

*See* EJECTMENT.

————, demand of, under Lands Clauses Consolidation Act .. 529

*See* LANDS CLAUSES CONSOLIDATION ACT. 4.

PRACTICE—*Particulars of Plea.*] To a declaration on a policy of life insurance the defendant pleaded, that the proposal, the basis of the policy, declared the life insured had not had any symptoms of certain enumerated diseases, or any other complaint, whereas he had had symptoms of disease of the stomach:—The Court ordered particulars to be delivered of the symptoms of the disease alleged.

MARSHALL *v.* THE EMPEROR LIFE ASSURANCE SOCIETY .. .. 35

PAGE

2. PRACTICE—*Equitable Plea—Chose in Action—Assignment of Debt.*] To an action for money due on an award the defendant pleaded, on equitable grounds, that the plaintiff assigned the debt to D. & Co., who gave notice to the defendant, and that the assignment still remained in force, and that the defendant still remained liable to pay D. & Co.; that the action was not brought for the benefit of D. & Co. nor with their consent; and if the plaintiff recovered in the action the defendant would nevertheless be obliged to pay D. & Co.:—*Held*, that the plea was good, as a court of equity would grant an unconditional injunction to restrain the plaintiff from suing for his own benefit.
JEFFS *v.* DAY .. .. .. .. .. .. .. 372

3. ————, *New Trial in cause tried in County Court under* 19 & 20 *Vict. c.* 108, *s.* 26.] Where a cause brought in a superior court is tried in a county court pursuant to a judge's order, under the 19 & 20 Vict. c. 108, s. 26, the jurisdiction to grant a new trial remains in the superior court.
BALMFORTH *v.* PLEDGE .. .. .. .. .. .. 427

4. ———— on appeals to quarter sessions .. .. .. .. 632
*See* EASTER OFFERINGS.

5. ————: *See* INTERROGATORIES.

PRESCRIPTION, liability of parish to repair highway by .. .. 213
*See* HIGHWAY. 5.

PRINCIPAL AND AGENT—*Liability of Principal for act of Agent—Bill of Exchange.*] A. employed B. to manage his business, and to carry it on in the name of "B. & Co.;" the drawing and accepting bills of exchange was incidental to the carrying on of such a business, but it was stipulated between them that B. should not draw or accept bills. B. having accepted a bill in the name of "B. & Co.":—*Held*, that A. was liable on the bill in the hands of an indorsee, who took it without any knowledge of A. and B., or the business.
EDMUNDS, P. O. *v.* BUSHELL AND JONES .. .. .. .. 97

2. ————————, *Sale by Auction—Payment to Auctioneer by Bill of Exchange.*] An auctioneer, who is authorized to sell goods on the conditions that purchasers shall pay a deposit at once and the remainder of the purchase money to the auctioneer on or before delivery of the goods, has no authority to receive payment by a bill of exchange; and such payment will not discharge the purchaser.
WILLIAMS AND OTHERS *v.* EVANS .. .. .. .. 352

PROMISSORY NOTE—*Certainty of Payee.*] "On demand I promise to pay to the trustees of the W. Chapel or their treasurer for the time being 100*l.*" is a good promissory note, for there is no uncertainty in the payee, as the trustees alone are to be taken as payees, and their treasurer as their agent only to receive payment.
HOLMES AND OTHERS *v.* JAQUES .. .. .. .. .. 376

PUBLIC HEALTH ACT, 1848 (11 & 12 Vict. c. 63), ss. 2, 43, 58—"*Sewer*"—*Duty of Local Board of Health to cleanse Ditches.*] A stream supplied by the drainage, natural and artificial, of cultivated land, and receiving the drainage of two or three inhabited houses in its passage to the river into which it flows, is not a "sewer" within the meaning of the Public Health Act, 1848. A mandamus to a local board of health alleged that a drain or watercourse was in such a state as to be a nuisance injurious to health, and commanded the board to cleanse it. On a return and plea, the stream was found to be in the state alleged:—*Held*, that the prosecutor was not entitled to judgment: for that the duty of the local board, under section 58 of the Public Health Act, 1848, to cleanse drains, &c., is only conditional on

PAGE

the neglect of the owner or occupier of the land on which the nuisance exists to remove it after notice, and no such notice or neglect was alleged in the mandamus.

THE QUEEN *v.* THE LOCAL BOARD OF HEALTH OF THE BOROUGH OF GODMANCHESTER .. .. . .. Ex. Ch. 328

2. PUBLIC HEALTH ACT, 1848 (11 & 12 Vict. c. 63), s. 89—*Time for making Rate—Mandamus to enforce Claim.*] The Public Health Act (11 & 12 Vict. c. 63), s. 89, enacts that rates may be made "retrospectively, in order to raise money for the payment of charges and expenses which may have been incurred at any time within six months before the making of the rate":—*Held*, that the Court might grant a mandamus ordering a rate to be made in order to satisfy a judgment obtained within six months before the claim for the writ, though the action, in which the judgment was obtained, was commenced more than six months after the right of action accrued, provided the delay is excused and shewn not to have been undue.

The plaintiff in 1858 entered into contracts with the defendants, a local board of health, for the execution of works for the board, to be paid for out of money to be collected from those on whom the works were chargeable under the Public Health Act. The contracts were duly performed by the plaintiff. The notices given by the defendants turned out bad, and many of those who would otherwise have been liable refused to pay the sums assessed upon them. This became known to the plaintiff in February, 1860, and he then made a demand on the defendants. They were in hopes of being able to collect the money, notwithstanding the badness of the notices, and 800*l.* was in fact collected and paid over to the plaintiff, the last payment being in November, 1860, leaving a balance of more than 3000*l.* due to the plaintiff, and he commenced an action against the defendants early in the following December. Judgment was obtained by the plaintiff, and within six months he commenced an action, claiming a writ of mandamus commanding the defendants to levy a rate to satisfy the judgment:—*Held*, that the delay in commencing the original action was excused and shewn not to be undue, and that a peremptory writ might be granted.

WORTHINGTON AND ANOTHER *v.* HULTON, CLERK TO THE LOCAL BOARD OF HEALTH OF MOSS SIDE .. .. .. .. 63

PUBLIC HOUSE: *See* BEER-HOUSE.

QUO WARRANTO—*Disqualification of Relator—Local Board of Health, election of—Validity of Voting Papers left in blank—Duty of Chairman*—11 & 12 *Vict. c.* 63, *s.* 24.] By the 11 & 12 Vict. c. 63, s. 24, at the election of a local board of health, if the candidates nominated are more than the vacancies, "the chairman shall cause voting papers, in the form in schedule A, to be prepared and filled up, and shall insert therein the names of all the candidates; and shall three days before the election cause one of such voting papers to be left at the address or residence of each owner, proxy, and ratepayer." The form in the schedule has columns for the name and address of the voter, and the number of votes, as owner, as ratepayer. Previous to an election voting papers were delivered, duly filled up, except that the column for the number of votes was left in blank. After the election a rule for a quo warranto was obtained by M., one of the unsuccessful candidates, against two of the persons declared elected, on the ground that the voting papers having been left in blank the election was void. M. had himself voted with a voting paper left in blank, and had also taken part at former elections, when a similar course had been pursued, and had been himself so elected:—*Held*, that M. was disqualified

PAGE

from becoming relator. *Held*, also (by Blackburn and Mellor, JJ.; Shee, J., dissenting), that, although it was the chairman's duty to fill up the voting papers with the number of votes, the omission did not vitiate them and render the election void.

THE QUEEN *v.* LOFTHOUSE AND WILSON .. .. .. .. 433

RAILWAY COMPANY—*By-law—Breach of Contract.*] A by-law of the defendants, a railway company, was as follows: "No passenger will be allowed to enter any carriage without having first paid his fare and obtained a ticket. Each passenger, on payment of his fare, will be furnished with a ticket, which such passenger is to shew when required, and to deliver up, before leaving the company's premises, upon demand." The plaintiff took tickets for himself, his servants, and horses, by a particular train, on the defendant's railway. The train was afterwards divided into two. The plaintiff travelled in the first train, taking all the tickets with him. When the second train with the servants and horses was about to start, the plaintiff's servants were required to produce their tickets, and on their being unable to do so, the defendants refused to carry them:—*Held*, in an action by the plaintiff for not carrying his servants, that as the defendants contracted with the plaintiff, and delivered the tickets to him and not to the servants, the defendants could not, under the by-law, justify their refusal to carry.

JENNINGS *v.* THE GREAT NORTHERN RAILWAY COMPANY .. 7

2. ——————, *By-law, validity and construction of—Travelling without a Ticket—*8 *Vict. c.* 20, *ss.* 103 *&* 109.] By a by-law of a railway company, no passenger was to be allowed to enter or travel in a carriage without having paid his fare and obtained a ticket, which the passenger was to shew whenever required, and give up on demand before leaving the company's premises. And any passenger not so producing or delivering up his ticket was to be required to pay the fare from the place whence the train originally started, or forfeit a sum not exceeding forty shillings:—*Held*, that this by-law only applied to the case of a person having and wilfully refusing to produce or give up his ticket, and not to the case of a person travelling without having paid for and obtained a ticket, with no intention to defraud the company. *Held*, also, that if the by-law extended to the latter case, it would have been illegal and void under the 8 Vict. c. 20, s. 109, as repugnant to section 103, which makes a fraudulent intention the gist of the offence of travelling without having paid the fare.

DEARDEN, Appellant; TOWNSEND, Respondent .. .. .. 10

3. ——————, *Compensation—Lands injuriously affected—Annoyance by Vibration after construction of Railway—Lands Clauses Consolidation Act*, 1845 (8 *&* 9 *Vict. c.* 18), *s.* 68; *Railways Clauses Consolidation Act*, 1845 (8 *&* 9 *Vict. c.* 20), *ss.* 6 *and* 16.] The owner of a house, none of whose lands have been taken for the purposes of the railway, cannot under the Lands Clauses Consolidation Act, 1845, or the Railways Clauses Consolidation Act, 1845, recover compensation in respect of injury to the house depreciating its value, caused by vibration, smoke, and noise in running locomotives with trains in the ordinary manner, after the construction of the railway.

BRAND AND WIFE *v.* HAMMERSMITH AND CITY RAILWAY COMPANY 130

4. ——————, negligence of, in keeping level crossing .. 277

*See* NEGLIGENCE. 3.

5. ——————, sale of superfluous lands under Lands Clauses Consolidation Act .. .. .. .. .. .. .. 510

*See* LANDS CLAUSES CONSOLIDATION ACT. 3.

PAGE

6. RAILWAY COMPANY, compensation by, under Lands Clauses Consolidation Act .. .. .. .. .. .. .. .. 529
*See* LANDS CLAUSES CONSOLIDATION ACT. 4.

7. ———————, how assessed to poor-rate .. .. .. 666
*See* POOR-RATE. 5.

8. ———————: *See* LANDS CLAUSES CONSOLIDATION ACT.

RAILWAYS CLAUSES CONSOLIDATION ACT (8 *Vict. c.* 20), *s.* 3—"*Justice*"—*Jurisdiction, want of, on ground of Interest.*] The Railways Clauses Consolidation Act (8 Vict. c. 20), s. 3, enacts that "justice" shall mean "a justice acting for the county, &c., in which the matter requiring the cognizance of such justice shall arise, and who shall not be interested in the matter":—*Held*, that the latter part of the definition is merely declaratory of the common law, and does not confine the jurisdiction given by different sections of the act to a justice of the county, &c., not being interested; and, therefore, where, on the hearing of a complaint under section 58, an objection to a justice on the ground of interest is waived by the parties, the justice has jurisdiction, and the objection of want of jurisdiction cannot afterwards be raised.
THE WAKEFIELD LOCAL BOARD OF HEALTH, Appellants; THE WEST RIDING AND GRIMSBY RAILWAY COMPANY, Respondents 84

2. ———————, recovery of compensation under .. 130
*See* RAILWAY COMPANY. 3.

3. ———————, duty enforced on railway company by section 47 .. .. .. .. .. .. .. .. .. 277
*See* NEGLIGENCE. 3.

RATEABLE VALUE, how ascertained .. .. .. .. .. 16
*See* POOR-RATE. 1.

RATES, time for making under Public Health Act, 1848 .. .. .. 63
*See* PUBLIC HEALTH ACT, 1848. 2.

———, exemption from highway, since Highway Act of 1862 .. .. 218
*See* HIGHWAY. 4.

———, order of justices for contribution out of highway .. .. .. 396
*See* HIGHWAY. 8.

———, charges for distress of church .. .. .. .. .. 405
*See* CHURCH-RATES.

———: *See* POOR-RATE.

RATING OF GASWORKS: *See* POOR-RATE. 3.

REGISTER of ship, how far evidence of ownership of .. .. .. 534
*See* EVIDENCE. 1.

REGISTRATION of pattern under Copyright of Designs Acts .. .. 264
*See* COPYRIGHT OF DESIGNS ACTS.

———————,-effect of certificate of, of deed of assignment .. .. 502
*See* BANKRUPTCY ACT, 1861. 7.

REGISTRATION OF JUDGMENT DEBT, effect of .. .. .. 355
*See* JUDGMENT DEBT.

REGULÆ GENERALES as to Common Law Stamps .. .. .. 725

RELEASE, construction of .. .. .. .. .. .. .. 101
*See* BANKRUPTCY ACT, 1861. 2.

RESIDENCE, what amounts to a break of, under poor laws .. 21, 227
*See* POOR. 1, 4.

PAGE

REWARD, ACTION FOR—*Information "leading" to Apprehension of Offender—Remoteness of Cause.*] The defendant's shop having been broken into, and watches and jewellery stolen, the defendant advertised, "A reward will be given to any person who will give such information as shall lead to the apprehension and conviction of the thieves." In about a week, R. having brought one of the stolen watches to the plaintiff's shop, the plaintiff gave information, and R. was apprehended the same day with another of the stolen watches upon him. After two or three days, R., being in custody, told the police that some of the thieves would be found at a certain shop, and there they were apprehended a week afterwards, and subsequently convicted. In an action by the plaintiff for the reward, the jury having returned a verdict for the plaintiff:—*Held* (by Mellor and Shee, JJ., Blackburn, J., doubting), that the information given by the plaintiff was not so remote as that it could not be said to have "led" to the apprehension of the thieves; and that the judge had properly left the evidence to the jury, pointing out the remoteness of the information.
TARNER *v.* WALKER .. .. .. .. .. .. .. 641

RIGHT TO BEGIN ON CROSS DEMURRERS on argument of petition of right .. .. .. .. .. .. .. .. .. 173
*See* CONTRACT BY GOVERNMENT OFFICIALS.

ROAD, notice of appeal against shutting up .. .. .. .. 36
*See* INCLOSURE ACT, 1845.

SALMON FISHERY ACT, 1865 (28 & 29 *Vict. c.* 121), *ss.* 3, 4, & 5—*Jurisdiction of Secretary of State to form Fishery Districts.*] Under the Salmon Fishery Act, 1865, 28 & 29 Vict. c. 121, ss. 3, 4, & 5, when the justices of any county in quarter sessions have applied to the Secretary of State to form into a fishery district any river lying wholly or partly in their county, the Secretary of State has jurisdiction by his certificate to enlarge the limits of the district to any extent, in the same and the neighbouring counties, that he in his discretion may think fit.
THE QUEEN *v.* SIR GEORGE GREY, BART. .. .. .. 469

SEAL, effect of contract not under, by corporation .. .. .. 620
*See* CORPORATION.

SECRETARY OF STATE, jurisdiction of, to form fishery districts .. 469
*See* SALMON FISHERY ACT, 1865.

SERVANT: *See* MASTER AND SERVANT. NEGLIGENCE.

SESSIONS, appeal to what, against order adjudging settlement of pauper lunatic .. .. .. .. .. .. .. .. .. 385
*See* POOR. 5.

SETTLEMENT, by renting a tenement .. .. .. .. .. 33
*See* POOR. 2.

SEWER, meaning of word under Public Health Act, 1848 .. .. 328
*See* PUBLIC HEALTH ACT, 1848. 1.

SHERIFF, liability of, releasing debtor whom he had arrested, on production of a certificate of registration of a deed of assignment under s. 192 of Bankruptcy Act, 1861 .. .. .. .. .. 502
*See* BANKRUPTCY ACT, 1861. 7.

SHIP AND SHIPPING—*Contract of Affreightment, governed by what Law as to Sea damage—Authority of Master to bind Owners—Conflict of Laws—Law of France—Bottomry.*] Where the contract of affreightment does not provide otherwise, as between the parties to

PAGE

the contract, in respect of sea damage and its incidents, the law of the country to which the ship belongs must be taken to be the law to which they have submitted themselves. The plaintiff, a British subject, chartered a French ship belonging to French owners, at a Danish West India port, for a voyage from St. Marc, in Hayti, to Havre, London, or Liverpool, at charterer's option. The charter-party was entered into by the master in pursuance of his general authority as master. The plaintiff shipped a cargo at St. Marc for Liverpool, with which the vessel sailed. On her voyage she sustained sea damage and put into Fayal, a Portuguese port, for repair. There the master properly borrowed money on bottomry of ship, freight, and cargo, and repaired the ship, and she completed her voyage to Liverpool. The bondholder proceeded in the Court of Admiralty against the ship, freight, and cargo. The ship and freight were insufficient to satisfy the bond; and the deficiency with costs fell on the plaintiff as owner of the cargo, for which he sought indemnity against the defendants, the French shipowners. The defendants gave up the ship and freight to the shipper, so as that, by the alleged law of France, the abandonment absolved them from all further liability on the contract of the master:—*Held*, that the parties must be taken to have submitted themselves, when making the charter-party, to the French law as the law of the ship, and therefore that, assuming the law of France to be as alleged, the plaintiff's claim was absolutely barred.

LLOYD *v.* GUIBERT AND OTHERS .. .. .. .. Ex. Ch. 115

2. SHIP AND SHIPPING, *Marine Insurance—Deck Cargo—Certificate of Clearance*—16 & 17 *Vict. c.* 107, *ss.* 170, 171, 172—*Illegal Act of Master—Privity and Liability of Owner.*] The plaintiff, the owner of a ship, effected a policy on freight from a British port in North America to Liverpool. The ship sailed with a cargo of timber between the 1st of September and the 1st of May. The master, without the knowledge or privity of his owner, stowed a portion of the cargo on deck and sailed without any certificate from a clearing officer that the whole cargo was below deck, contrary to 16 & 17 Vict. c. 107, ss. 170, 171, & 172. On a loss by perils insured against:—*Held*, that although the master had general authority from his owner to stow the cargo, no authority could be implied to load it so as to violate the statute, neither was it an act of the master which the owner must be presumed to have assented to; that the fact of the ship having sailed without the certificate did not render her unseaworthy at the commencement of her voyage so as to prevent the policy attaching; and, consequently, that the plaintiff was not precluded from recovering against the underwriter.

WILSON *v.* RANKIN .. .. .. .. .. Ex. Ch. 162

3. ——————————, as to what is a constructive total loss .. 520
*See* MARINE INSURANCE. 1.

4. ——————————, how far register primâ facie evidence of ownership of .. .. .. .. .. .. .. .. .. 534
*See* EVIDENCE. 1.

SLANDER, interrogatories when allowed in action for .. .. .. 628
*See* INTERROGATORIES. 2.

SOCIETY: *See* FRIENDLY SOCIETY.

SPECIAL CASE, evidence and documents in appendix to, must be numbered in paragraphs .. .. .. .. .. .. .. 444
*See* METROPOLITAN POLICE ACTS.

STAGE PLAY, performance of, in unlicensed place .. .. .. 93
*See* THEATRE.

PAGE

STATUTES:

43 Eliz. c. 2, s. 1 .. .. .. .. .. .. .. .. 72
*See* POOR. 3.

7 & 8 Wm. 3, c. 6, s. 7 .. .. .. .. .. .. .. .. 632
*See* EASTER OFFERINGS.

35 Geo. 3, c. 113, s. 1 .. .. .. .. .. .. .. .. 270
*See* LICENSED VICTUALLERS.

53 Geo. 3, c. 127, s. 7 .. .. .. .. .. .. .. .. 405
*See* CHURCH-RATES.

57 Geo. 3, c. 93, ss. 1, 2 .. .. .. .. .. .. .. .. 405
*See* CHURCH-RATES.

4 Geo. 4, c. 34, s. 3 .. .. .. .. .. .. .. .. 417
*See* MASTER AND SERVANT. 1.

————, c. 95, s. 75 .. .. .. .. .. .. .. .. 261
*See* HIGHWAY. 7.

6 Geo. 4, c. 57 .. .. .. .. .. .. .. .. .. 38
*See* POOR. 2.

————, c. 81, s. 11 .. .. .. .. .. .. .. .. 270
*See* LICENSED VICTUALLERS.

7 & 8 Geo. 4, c. 17, s. 1 .. .. .. .. .. .. .. .. 405
*See* CHURCH-RATES.

11 Geo. 4, and 1 Wm. 4, c. 68 .. .. .. .. .. .. .. 54
*See* CARRIERS.

1 & 2 Wm. 4, c. 32, ss. 3 & 23 .. .. .. .. .. .. .. 87
*See* GAME. 1.

5 & 6 Wm. 4, c. 50, s. 6 .. .. .. .. .. .. .. .. C8
*See* HIGHWAY. 1.

————————, s. 85 .. .. .. .. .. .. .. 648
*See* HIGHWAY. 3.

6 & 7 Wm. 4, c. 96, s. 1 .. .. .. .. .. .. 18, 241, 666
*See* POOR-RATE. 2, 3, 5.

2 & 3 Vict. c. 47, s. 66 .. .. .. .. .. .. .. .. 444
*See* METROPOLITAN POLICE ACTS.

————, c. 71, s. 24 .. .. .. .. .. .. .. .. 444
*See* METROPOLITAN POLICE ACTS.

3 & 4 Vict. c. 61, s. 15 .. .. .. .. .. .. .. .. 489
*See* BEER-HOUSE.

4 & 5 Vict. c. 59, s. 1 .. .. .. .. .. .. .. .. 396
*See* HIGHWAY. 8.

6 & 7 Vict. c. 37 .. .. .. .. .. .. .. .. .. 110
*See* LOCAL GOVERNMENT ACT, 1858.

————, c. 68, s. 2 .. .. .. .. .. .. .. .. 93
*See* THEATRE.

8 & 9 Vict. c. 18, ss. 18, 121 .. .. .. .. .. .. .. 529
*See* LANDS CLAUSES CONSOLIDATION ACT. 4.

————, ss. 51 & 68 .. .. .. .. .. .. .. .. 237
*See* LANDS CLAUSES CONSOLIDATION ACT. 1.

————, ss. 51, 94 .. .. .. .. .. .. .. .. 342
*See* LANDS CLAUSES CONSOLIDATION ACT. 2.

————, s. 68 .. .. .. .. .. .. .. .. 130
*See* RAILWAY COMPANY. 3.

PAGE

STATUTES (*continued*):

8 & 9 Vict. c. 18, s. 127 .. .. .. .. .. .. .. 510
*See* LANDS CLAUSES CONSOLIDATION ACT. 3.

———, c. 20, ss. 6 & 16 .. .. .. .. .. .. 130
*See* RAILWAY COMPANY. 3.

———, s. 47 .. .. .. .. .. .. .. .. 277
*See* NEGLIGENCE. 3.

———, ss. 103 & 109 .. .. .. .. .. 10
*See* RAILWAY COMPANY. 2.

———, c. 118, ss. 62, 63, 64 .. .. .. .. .. .. 36
*See* INCLOSURE ACT, 1845.

———, s. 116 .. .. .. .. .. .. .. 359
*See* POOR-RATE. 4.

9 & 10 Vict. c. 66, s. 1 .. .. .. .. .. .. .. 21
*See* POOR. 1.

11 & 12 Vict. c. 63, s. 34 .. .. .. .. .. .. 433
*See* QUO WARRANTO.

———, s. 89 .. .. .. .. .. .. 63
*See* PUBLIC HEALTH ACT. 2.

12 & 13 Vict. c. 87, s. 3 .. .. .. .. .. .. .. 24
*See* HIGHWAY. 6.

15 & 16 Vict. c. 51 .. .. .. .. .. .. .. 44
*See* COPYHOLD.

16 & 17 Vict. c. 97, s. 108 .. .. .. .. .. .. 385
*See* POOR. 5.

———, c. 107, ss. 170, 171, 172 .. .. .. .. 162
*See* SHIP AND SHIPPING. 2.

17 & 18 Vict. c. 125, s. 51 .. .. .. .. .. .. 89, 628
*See* INTERROGATORIES. 1, 2.

———, s. 63 .. .. .. .. .. .. .. 77
*See* DEBTOR AND CREDITOR.

18 & 19 Vict. c. 63, s. 21 .. .. .. .. .. .. 274
*See* FRIENDLY SOCIETY. 2.

———, c. 120, s. 105 .. .. .. .. .. .. 233
*See* METROPOLIS MANAGEMENT ACTS.

19 & 20 Vict. c. 108, s. 26 .. .. .. .. .. .. 427
*See* PRACTICE. 3.

20 & 21 Vict. c. 43 .. .. .. .. .. .. .. 388
*See* FRIENDLY SOCIETY. 1.

———, c. 50, s. 2 .. .. .. .. .. .. 549
*See* LOCAL BOARD OF HEALTH. 1.

———, c. 81, s. 23 .. .. .. .. .. .. 475
*See* BURIAL ACTS.

21 & 22 Vict. c. 94 .. .. .. .. .. .. .. 44
*See* COPYHOLD.

———, c. 98, ss. 12, 13, 14, 16 .. .. .. .. 110
*See* LOCAL GOVERNMENT ACT, 1858.

———, c. 101, s. 5 .. .. .. .. .. .. 388
*See* FRIENDLY SOCIETY. 1.

PAGE

STATUTES (*continued*):

22 Vict. c. 1, s. 1 .. .. .. .. .. .. .. 475
*See* BURIAL ACTS.

23 & 24 Vict. c. 38, s. 3 .. .. .. .. .. .. 355
*See* JUDGMENT DEBT.

24 & 25 Vict. c. 134 .. .. .. .. .. .. .. 167
*See* BANKRUPTCY ACT, 1861.

——————, ss. 99, 103 .. .. .. .. .. 494
*See* BANKRUPTCY ACT, 1861. 1.

——————, s. 192 .. .. .. .. .. 101, 167, 412
*See* BANKRUPTCY ACT, 1861. 2, 4, 6.

——————, ss. 192, 198 .. .. .. .. .. 502
*See* BANKRUPTCY ACT, 1861. 7.

25 & 26 Vict. c. 61 .. .. .. .. .. .. .. 218
*See* HIGHWAY. 4.

——————, s. 10 .. .. .. .. .. .. 68
*See* HIGHWAY. 1.

——————, s. 19 .. .. .. .. .. .. 558
*See* HIGHWAY. 2.

——————, c. 102, ss. 77, 112 .. .. .. .. .. 233
*See* METROPOLIS MANAGEMENT ACTS.

27 & 28 Vict. c. 101, s. 10 .. .. .. .. .. .. 68
*See* HIGHWAY. 1.

28 & 29 Vict. c. 121, ss. 3, 4, 5 .. .. .. .. .. 469
*See* SALMON FISHERY ACT, 1865.

STREET paving, under Metropolis Management Acts .. .. .. 233
*See* METROPOLIS MANAGEMENT ACTS.

SUNDAY, driving cattle on .. .. .. .. .. .. .. 259
*See* CATTLE.

TENANT: *See* LANDLORD AND TENANT.

TERRIER, construction of .. .. .. .. .. .. .. 632
*See* EASTER OFFERINGS.

TESTAMENT: *See* WILL.

THEATRE—*Performance of Stage Plays in Unlicensed Place—6 & 7 Vict. c. 68, s. 2.*] A person who hires an unlicensed public room for six nights, and publicly performs stage plays in it, is not liable to be convicted under section 2 of the 6 & 7 Vict. c. 68, for "having and keeping" a place of public resort for the public performance of stage plays without a licence.

THE QUEEN, *on the prosecution of* ROSENTHAL AND TAYLOR, Appellants *v.* STRUGNELL, Respondent .. .. .. 93

TICKET, travelling without, effect of .. .. .. .. .. 10
*See* RAILWAY COMPANY. 2.

TITLE BY POSSESSION .. .. .. .. .. .. .. 1
*See* EJECTMENT.

TOLLS, application of, of turnpike road to payment of money borrowed on security of .. .. .. .. .. .. .. .. 24
*See* HIGHWAY. 6.

TOTAL LOSS, what amounts to a constructive .. .. .. .. 520
*See* MARINE INSURANCE. 1.

PAGE

TRIAL, second, may be had when jury on first discharged without giving verdict .. .. .. .. .. .. .. .. .. 289
*See* CRIMINAL LAW. 1.

TURNPIKE ROAD, cattle straying on .. .. .. .. .. 261
*See* HIGHWAY. 7.

———————: *See* HIGHWAY.

———— TRUST, order of justices for contribution out of highway rates .. .. .. .. .. .. .. .. .. 396
*See* HIGHWAY. 8.

UNION, within several jurisdictions must appeal to what sessions .. 385
*See* POOR. 5.

VICTUALLERS: *See* LICENSED VICTUALLERS.

WARRANTY—*Sale of Horse—Construction—"Warranted sound for one Month."*] On the sale of a horse the seller signed the following warranty:—"June 5, 1865. Mr. C. bought of Mr. G. G. a bay horse for ninety pounds, warranted sound. 90*l*.—G. G. Warranted sound for one month.—G. G.":—*Held*, that the latter words limited the duration of the warranty, and meant that the warranty was to continue in force for one month only; and that complaint of unsoundness must therefore be made by the purchaser within one month of the sale.
CHAPMAN *v.* GWYTHER .. .. .. .. .. .. 463

WASTE OF MANOR, effect of grant of piece of .. .. .. .. 44
*See* COPYHOLD.

————————, conversion of, into stinted pasture .. .. 359
*See* POOR-RATE. 4.

WATER-RATE, payment made for, cannot be deducted from gross rental under 6 & 7 Wm. 4, c. 96, s. 1, when .. .. .. .. .. 18
*See* POOR-RATE. 2.

WILL—*Devise—Words "as now in the occupation of A."—Easement.*] A testatrix, at the date of her will, was the owner of two adjoining houses and premises; she occupied one herself, in the yard belonging to which was a pump, the other house was and has been for some time occupied by T. A., as her tenant, and he, with the knowledge of the testatrix, had been accustomed to go into the yard and draw water from the pump for the use of his house, there being no water supply on his premises. Under a devise of this house "as now in the occupation of T. A.":—*Held*, that the right to the use of the pump did not pass.
POLDEN *v.* BASTARD .. .. .. .. .. Ex. Ch. 156

2. ——, *Devise without Words of Inheritance—When it gives an Estate in Fee Simple—Introductory Words "as touching such worldly estate wherewith it hath pleased God to bless me"—Words "freely to be possessed and enjoyed"—"All my children to be educated and settled in business according to my wife's discretion."*] A testator by will made before the Wills Act devised thus:—"As touching such worldly estate wherewith it hath pleased God to bless me in this life, I give and bequeath to my wife, whom I likewise constitute my sole executrix, all and singular my lands, messuages, and tenements, by her freely to be possessed and enjoyed, together with all my houses and household goods, deeds, and moveable effects, all my children to be educated and settled in business according to my wife's discretion":—

PAGE

*Held*, that the last clause indicated an intention that the wife should take such an estate as would enable her to carry out the wishes of the testator, and that she therefore took an estate in fee, and not merely a life estate, which was all that the prior words of the will standing alone would have given her.
LLOYD *v.* JACKSON AND ANOTHER .. .. .. .. .. 570

WITHDRAWAL OF JUROR, authority of counsel to consent to .. 379
*See* COUNSEL.

WITNESS, where two prisoners are jointly indicted for a felony, and plead not guilty, but one only is given in charge to the jury, the other is an admissible witness, although his plea of not guilty remains on the record undisposed of .. .. .. .. .. .. .. 390
*See* CRIMINAL LAW. 1.

WORDS "as now in the occupation of" .. .. .. .. .. 156
*See* WILL. 1.

——— "conducting," or "driving" .. .. .. .. .. 259
*See* CATTLE.

——— "freely to be possessed and enjoyed" .. .. .. .. 570
*See* WILL. 2.

——— "parish or place" .. .. .. .. .. .. .. 489
*See* BEER-HOUSE.

——— "place having defined boundary" .. .. .. .. 110
*See* LOCAL GOVERNMENT ACT, 1858.

——— "sewer."
*See* PUBLIC HEALTH ACT, 1848. 1. .. .. .. .. 328

——— "substantial householder" .. .. .. .. .. 72
*See* POOR. 3.

——— "trustees for executing act for paving," &c. .. .. .. 549
*See* LOCAL BOARD OF HEALTH. 1.

——— "wandering, straying, or lying" .. .. .. .. .. 261
*See* HIGHWAY. 7.

——— "warranted sound for one month" .. .. .. .. 463
*See* WARRANTY.

WRIT OF ERROR: *See* CRIMINAL LAW. 1.

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